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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 430

JAMES SAILORS, ET AL., APPELLANTS

v.

BOARD OF EDUCATION OF THE COUNTY OF KENT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

No. 491

BOARD OF SUPERVISORS OF SUFFOLK COUNTY, NEW YORK, ET AL., APPELLANTS

v.

L. WILLIAM BIANCHI, JR., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

No. 624

EARLE C. MOODY, ET AL., APPELLANTS

v.

RICHMOND M. FLOWERS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

No. 724

FRANK A. DUBSH, ET AL., APPELLANTS

v.

J. E. CLAYTON DAVIS, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

1. No. 430. The majority and dissenting opinions of the three-judge district court (R. 430; 198–219,

220–222[1]) are reported at 254 F. Supp. 17 (W.D. Mich.).

2. No. 491. The opinion of the three-judge district court (R. 491; 189–198) is reported at 256 F. Supp. 617 (E.D.N.Y.). A prior opinion of the three-judge district court (R. 491; 123–136) is reported at 238 F. Supp. 997 (E.D.N.Y.) and the earlier opinion of a single district judge (R. 491; 108–111) is reported at 217 F. Supp. 166 (E.D.N.Y.).

3. No. 624. The majority and dissenting opinions of the three-judge district court (R. 624; 56–64, 65–71) are reported at 256 F. Supp. 195 (M.D. Ala.).

4. No. 724. The opinion of the Court of Appeals for the Fourth Circuit (R. 724; 116–122) is reported at 361 F. 2d 495. The prior opinions of the district court (R. 724; 74–77, 78–82, 105–115) are unreported.

JURISDICTION

1. No. 430. The order of the three-judge district court, dismissing the complaint, was entered on May 2, 1966 (R. 430; 223–224). A notice of appeal to this Court was filed on June 16, 1966, and probable jurisdiction was noted on December 5, 1966 (R. 430; 224–225, 226). The jurisdiction of this Court is grounded upon 28 U.S.C. 1253.

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[1] In order to avoid confusion, since the government is filing one brief in the four instant cases, citations to the records will include the number of the case involved. The case numbers will appear immediately after the capital "R." and before the page numbers being cited.

[2] A later, unreported *per curiam* opinion is not printed in the Record, but is contained in the Appendix to the Jurisdictional Statement filed in No. 491 (J.S. 491; 18a–19a).

2. No. 491. The judgment of the three-judge district court was entered on June 15, 1966 (R. 491; 198–199). Notices of appeal to this Court were filed on June 30, 1966, and probable jurisdiction was noted on December 5, 1966 (R. 491; 216–219, 219–223). The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

3. No. 624. The order of three-judge court, dismissing the cause, was entered on June 10, 1966 (R. 624; 72). A notice of appeal to this Court was filed on August 5, 1966, and probable jurisdiction was noted on December 5, 1966 (R. 624; 148–153, 159). The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

4. No. 724. The judgment of the court of appeals was entered on May 30, 1966 (R. 724; 123). A notice of appeal to this Court was filed on August 26, 1966 (R. 724; 124–125), and, on January 9, 1967, an order of this Court set the case for argument along with the other three cases, with the question of jurisdiction postponed to the hearing on the merits (R. 724; 127). The jurisdiction of this Court rests upon 28 U.S.C. 1254(2).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> * * * No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.

Section 294a of the Michigan School Code (Mich. Stat. Ann., Sec. 15.3294(1)) is set out in Appendix A–I *infra*, pp. 131–132. Sections 201 and 203 of the

Suffolk County Charter (Ch. 278, Laws of New York, 1958) are set out in Appendix A–II *infra*, p. 133. Act No. 9, Sec. 2, Acts of Alabama, Reg. Sess., 1957, is set out in Appendix A–III *infra*, pp. 134–135. Sections 3.01 and 3.02 of the Charter of the City of Virginia Beach (Ch. 147, Acts of Assembly of Virginia, 1962, as amended by Ch. 39, Acts of Assembly of Virginia, 1966) are set out in Appendix A–IV *infra*, p. 136.[4]

QUESTIONS PRESENTED

1. Whether the equal-population principle enunciated in *Reynolds* v. *Sims*, 377 U.S. 533, and other cases involving State legislative apportionment, is applicable as well to the district-based election of members of the governing boards of local governmental units, such as counties, municipalities, and school districts.

2. Whether that principle, assuming its applicability at the local level, (1) prohibits the use of an election scheme under which members of a local governing board are elected at large but must reside in and declare their candidacy from residence districts, where such residence districts are grossly disproportionate in population, and (2) prohibits the use of a two-step election scheme under which members of a local governing board are elected by an

[4] Only those statutory provisions dealing directly with the manner of selection and the districting for and apportionment of members of the governing bodies involved in these four cases have been set out. Additional provisions not directly involved, such as those defining the powers and duties of the respective governing bodies, are contained in the respective records and presumably will also be set out in the briefs of the parties.

assembly whose members are popularly elected by districts, where such election districts are grossly disproportionate in population.

INTEREST OF THE UNITED STATES

Like *Baker* v. *Carr*, 369 U.S. 186, *Gray* v. *Sanders*, 372 U.S. 368, *Wesberry* v. *Sanders*, 376 U.S. 1, and *Reynolds* v. *Sims*, 377 U.S. 533, and the companion State legislative apportionment cases, the instant cases involve a most important and fundamental right in a democratic society—the right to full and fair participation in government by all citizens on an equal basis. In all of the above-cited cases, because of the far-reaching issues involved, the United States participated *amicus curiae*. We have a similar interest here.

In our view, a citizen's right to a properly weighted vote in the election of members of local governmental bodies is no less important than in the election of State legislators and congressmen. Activities of local governments affect citizens most directly, and involve matters of great significance to millions of Americans. Many programs of the federal government are administered by and through local governments, and billions of dollars of federal funds are provided for their accomplishment. Urbanization and population growth have resulted in a great expansion in demands for governmental services at the local level. Malapportionment at the local governmental level weakens the voice of certain citizens in the processes of these bodies, and dilutes the weight of their vote simply because of where they happen to reside. Malapportionment at the local level may also in part frustrate the intent of

Congress in enacting the Voting Rights Act of 1965, and dim the bright promise of that legislation for many newly enfranchised citizens.

Thus, the interest of the United States in these cases is that of millions of American citizens who are presently denied or may be denied, through malapportionment at the local level, full and effective participation in the processes of the various units of local government. It is the position of the United States that, as a matter of constitutional principle, logic, and sound policy, the equal-population principle of *Reynolds* v. *Sims* applies to local governmental bodies whose members are elected from districts, and requires that those districts be substantially equal in population.

STATEMENT

These four cases come from four different States and involve four different units and three different forms of local government. Nevertheless, their similarities, factual as well as legal, overshadow their differences and, considered together, they present an excellent framework for deciding the central issue here raised.

In each case the complaint was brought by a group of residents, taxpayers and voters of a political subdivisi n of the State against various State and local officials. In each case the plaintiffs sought a declaration that the statute or charter pursuant to which the members of the particular governing body were elected, by providing for their election on a basis which failed to accord even approximately equal

weight to the vote of each elector, deprived the plaintiffs of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. They also sought appropriate injunctive and other relief.

Factually, the principal features common to all four cases are: (1) the existence of a unit of local government exercising substantial powers and extending its authority over the plaintiffs and others similarly situated; (2) the election of the members of the governing board of the local unit from prescribed districts or through analogous election schemes; and (3) a system of districting which, by virtue of population disparities, accords the plaintiffs a substantially diluted and debased vote, when compared with the weight of the vote of citizens living elsewhere within the unit, in electing members of the same representative body.

1. No. 491.[4] Suffolk County is governed by a charter adopted by the electors of the county and incorporated into the New York Laws by the State legislature.[5] Under this charter, the executive authority for each town in the county is an *ex-officio* member of the County Board of Supervisors. Thus, in effect, the voters in each of the 10 towns in Suffolk County elect one member of the 10-man County Board. According to the 1960 census, the population of the 10 towns varied from a high of 172,956 in Islip to a low of 1,312 in Shelter Island.

[4] For convenience and simplicity, the four cases will be referred to throughout by their respective docket numbers, instead of names.

[5] Laws of New York, 1958, Ch. 278, Secs. 201-208.

The Board exercises general legislative authority over all matters of county government delegated by the State, including police protection, public works, health and welfare, zoning and planning, and civil defense. It also has the power to make appropriations, levy taxes, and incur indebtedness, and is the policy-determining body of the county.

This action was instituted in July 1962 in the United States District Court for the Eastern District of New York. On February 1, 1965, a three-judge district court, convened at the request of the plaintiffs, found the Board of Supervisors to be an "invidiously disproportionate system" and denied the motion of the defendants that the plaintiffs' action be dismissed. At the same time, the Court denied the plaintiffs' motion for an injunction against the continued operation of the Board, pending legislative or other political action to correct the inequities complained of, and retained jurisdiction (R. 491; 137–138). An appeal of that order by the defendants was dismissed by this Court for want of jurisdiction, in *Griffing* v. *Bianchi*, 382 U.S. 15, presumably because the order below was not a final one. Upon reapplication by the plaintiffs, as provided in the prior order, the district court, on June 15, 1966, ordered the defendant Board of Supervisors to proceed, under an interim arrangement by which the votes of the supervisors would be weighted according to the populations of the districts from which they were elected, to adopt and submit to the electorate a constitutionally valid, permanent plan of apportionment (R. 491; 198–199).

2. No. 624. The governing body for Houston County, Alabama, is called the Board of Revenue and Control. The Board has six members, five who are elected by districts established by the State legislature,[3] and the Judge of Probate, elected at large, who serves as *ex-officio* chairman. According to the 1960 census, approximately 61 percent of the population of Houston County reside in District No. 5, which is coterminous with the city of Dothan and located in the center of the county. The remaining 39 percent are assumed to be fairly evenly distributed among the other four districts, in roughly the same ratios as the distribution of registered voters.[4]

The legislation creating the Board conferred upon it "all the general authority, power and duties now provided, or which may hereafter be provided to Boards of Revenue or Commissioners Courts, under the general laws of the State of Alabama."[5] These powers include authority over the roads, bridges and causeways, responsibility for sanitation, public welfare and general health conditions, control over all county property, including courthouses, jails, hospitals and waterworks, and authority to own and lease real and personal property in order to promote industry and commerce. In order to carry out these functions, it has authority to levy and collect general and special taxes (subject to limitations set by the

[3] Acts of Alabama, Reg. Sess., 1957, No. 9.

[4] Only registered voter, and not total population, figures were available for the other four districts.

[5] Acts of Alabama, Reg. Sess., 1957, No. 9, Sec. 7 (set out in J.S. 624; 33–34).

State), the power of condemnation, and authority to issue revenue bonds.[9]

In a two-to-one decision, the three-judge district court denied the relief sought, apparently relying on three alternative grounds: (1) mere numerical imbalance, without a co-existing "serious wrong," does not amount to an invidious discrimination within the doctrine of *Baker* v. *Carr*; (2) a properly apportioned State legislature can provide an adequate remedy; (3) the Board does not have sufficient legislative powers to warrant the application of the rule of *Reynolds* v. *Sims* (R. 624; 61–63). In addition, the court below indicated its disposition to wait until this Court had definitively decided the question of whether *Reynolds* applies at the local level (R. 624; 62).

3. No. 724. The City of Virginia Beach was formed in 1963 by a consolidation of the former city of that name and all of what previously comprised Princess Anne County, Virginia. That consolidation and the charter under which the city is governed were approved by popular referenda and incorporated into the Virginia laws by the State legislature.[10]

The apportionment of City Council seats under the original charter, which alloted five members to the former City of Virginia Beach and six to the former boroughs of Princess Anne County, was found to be invalid by the United States District Court for the Eastern District of Virginia, on December 7, 1965. However, proceedings were stayed pending legislative action. Thereafter, the City Council submitted a new

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[9] Code of Alabama, Title 12, Secs. 11, 12, 16–19, 21–22, 177, 181, 185, 186, 191, 197, 300; Title 29, Sec. 3; Title 51, Sec. 71.

[10] Acts of Assembly of 1962, Ch. 147.

plan to the State legislature and the charter was amended.[11] Under the amended charter the council is composed of eleven members elected under the so-called "7–4 plan". Four members are elected by and from the city at large, and the other seven are elected by the city at large from among the residents of each of the seven boroughs established by the charter.[12] According to the 1960 census, the populations of these boroughs ranged from a high of 29,048 to a low of 733.

The charter granted by the State legislature confers upon the City Council all the powers previously possessed by both the City of Virginia Beach and Princess Anne County. Thus, the Council exercises general legislative authority, which includes the traditional municipal powers and functions and extends over what previously compromised an entire county.[13]

A three-judge court was convened at the request of the plaintiffs, but was dissolved before the ruling was made that the original consolidated council was unconstitutionally apportioned. After the legislature enacted the amended charter into law, the plaintiffs filed an amended complaint attacking the 7–4 plan. The district court found a compelling need for compromise during the period of transition from county to city government, and held that the 7–4 plan did not result in an invidious discrimination against

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[11] Acts of Assembly of 1966, Ch. 39.

[12] This is not a unique method of election. At-large elections with district residence requirements are used to elect the governing bodies in 620 counties throughout the country. See note 24, *infra*, and the discussion in note 88, *infra*.

[13] See also Code of Virginia, Sec. 15–77.1 through 15–77.70.

voters in the more populous residence districts (R. 724; 113–114). However, the Court of Appeals for the Fourth Circuit, in a unanimous decision, found that the 7–4 plan created disproportionate representation and a curtailment of selectivity and, therefore, violated the Equal Protection Clause. The court denied injunctive relief, in view of the proximity of elections, but ordered the district court to retain jurisdiction pending further legislative relief (R. 724; 122).

4. No. 430. The governmental unit involved in this case is the County, or Intermediate, School Board for Kent County, Michigan. The Board is created by the State, without the consent of the residents, to perform various administrative and legislative functions for the State Board of Education. Its authority includes the appointment of a county school superintendent, preparation of an annual budget and levy of taxes, distribution of delinquent taxes, recommendation of library books, conducting cooperative programs with other intermediate school boards, and employment of teachers for special educational programs. In addition, the Board may furnish services or conduct cooperative programs for the 39 "constituent" school districts within its jurisdiction.[14] One of its more sensitive functions, and the one giving rise to this action, is the power to transfer areas from one school district to another.[15]

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[14] Mich. Stat. Ann., Sec. 15.3298(1).

[15] Mich. Stat. Ann., Sec. 15.3461 *et seq.* Part of the relief prayed for in the complaint was the retransfer of certain areas from the Kentwood School District to the City of Grand Rapids School District. See note 96, *infra.*

The County School Board is not elected directly by the voters of the County. Instead, the voters of each of the 39 school districts in the county elect a Board of Education for that district.[16] The five-man County School Board is elected by an assembly consisting of one representative from each Board of Education.[17] Since each member of the assembly has one vote, the net effect is to accord each school district 1/39 of the total voice in electing members of the County School Board. According to the 1960 census, the Grand Rapids School District had a population of 201,777, or about 55.6 percent of the total population of Kent County. Several school districts had a population under 150, the lowest being 99 (R. 430; 163).

In a two-to-one decision, the three-judge district court determined not to anticipate the application of the one-person, one-vote rule to local governments and ruled against the plaintiffs (R. 430; 220–222). That court did not decide the case on the basis of the peculiarities of the two-step election scheme, but viewed the issue presented as the broad one of the applicability of *Reynolds* and related cases at the local governmental level (R. 430; 221; see note 95, *infra*).

ARGUMENT

INTRODUCTION AND SUMMARY

Strictly speaking, the Court's decisions in the four instant cases will relate only to the districting ar-

[16] See Mich. Stat. Ann., Secs. 15.3027, 15.3055, 15.3107, 15.3148, and 15.3188.

[17] Mich. Stat. Ann., Sec. 15.3294(1). A similar assembly is used to approve the County School Board's proposed budget. Mich. Stat. Ann., Sec. 15.3298(1).

rangements for the local governmental bodies involved in these cases. But it would blink reality not to recognize that the constitutional question involved is a broad one and that the holdings here will have implications directly affecting the constitutionality of local government apportionment schemes generally. As we see it, the broad constitutional issue is simply whether the equal-population principle of *Reynolds* v. *Sims*, 377 U.S. 533, and companion and related cases applies to districting at the local level of government. Accordingly, we think it may be helpful, at the outset, to discuss somewhat generally the nature and functions of local governments in order to provide a more general framework for considering and resolving the broad constitutional question.

The variations in the functions, powers and organization of local governments appear so great as to make any categorical statement precarious.[10] However, a few generalizations are possible. For this purpose, the most workable definitions and classifications are those used by the United States Bureau of the Census, the most reliable and convenient source of information and statistics on local government. These definitions and classifications are generally acceptable for our purposes, and are adopted and used here.

[10] For a fuller discussion, see U.S. Department of Commerce, Bureau of the Census, 1962 Census of Governments, Vol. I; International Union of Local Authorities, Local Government in the United States, Recent Trends and Developments 1961; The Municipal Year Book 1966 (Nolting and Arnold ed.). See also the tables included in the Appendix (*infra*, pp. 137-139).

A local government is defined by the Bureau of the Census as:

> * * * [an] organized entity which, in addition to having governmental character, has sufficient discretion in the management of its own affairs to distinguish it as separate from the administrative structure of any other governmental unit.[19]

For purposes of our discussion, we group local governments into three general classes: (1) Counties, municipalities, and townships; (2) School districts; (3) Special districts.[20]

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[19] In the Census Bureau's view, the critical factor is whether the unit has substantial fiscal and administrative autonomy. The power to tax is not, of itself, an essential element, nor is the method of selection—appointment or election—of the body exercising the unit's powers. 1962 Census of Governments, 15–17.

[20] According to 1962 Census of Governments, there were at that time some 91,185 local governments fitting this definition. As the table in Appendix B-I (*infra*, p. 187) shows, of these 91,185 local governments, 3,043 were counties (which figure increased to 3,049 by 1965), 17,997 were municipalities (a large majority of which were relatively small towns and villages), 17,144 were townships, 34,678 were school districts (which figure decreased to 28,814 by 1965), and 18,323 were special districts.

No useful generalization can be made about the size of the governing boards of these governmental units, since the variances from State to State and as between the different kinds of bodies is so great. For instance, county boards in some States are of fixed size, while others vary according to the number of cities, towns, etc., in the county, or, in some respects, according to the population of the subordinate units. Some bodies are as small as three, while others range up close to 100 members, and are thus larger than many State legislative bodies. Similarly, the terms of the members of local governmental bodies vary greatly, from as short as one year to as long as six or eight years.

A. COUNTIES, MUNICIPALITIES, AND TOWNSHIPS

These three units of local government constitute political subdivisions of the State, designed primarily to implement State legislation and State policies and to provide governmental services on the local level. There are, of course, a few characteristics which serve to distinguish these units one from the other. For example, counties and townships are usually established by the State without the consent of the residents, while municipalities are generally established by charters initiated and approved by those inhabiting the area to be incorporated. Municipalities in some States, and also occasionally counties, are organized pursuant to State constitutional or statutory provisions authorizing or conferring "home rule," and have powers of local self-government independent of the State in regard to matters of local concern. Municipal governments generally have broader legislative powers and responsibilities and more autonomy than county governments, while townships are frequently units of government for rural areas and have quite limited powers." Patterns vary across the country as to terminology as well as powers, and depend to a considerable extent on the historical background.[2] How-

[1] Included in the Census Bureau's category of townships, however, are "towns" in the New England States, New York, and Wisconsin, which in their nature and powers are more analogous to counties than to townships generally. See 1962 Census of Governments, 3.

[2] See, *eg.*, U.S. Department of Commerce, Bureau of the Census, Governing Boards of County Governments: 1965, 9–13 (Table 4), for a State-by-State delineation of the various names by which county governing boards are known.

ever, in the context of the instant problem, such differences are properly seen to be only a matter of emphasis. As a general matter, it is not inappropriate to characterize bodies exercising the powers of these units of government—county boards, city councils, and the like—as "little legislatures" and to classify them together.[23]

These governmental units ordinarily have the power to contract, the capacity to sue and be sued, the power of eminent domain, and various taxing powers—primarily, but not solely, involving the levying and collection of property taxes. Their legislative competence may cover some, or all, of the following areas: police and fire protection, zoning and planning, parks and recreation, libraries, hospitals and health services, public welfare, housing and urban renewal, water supply and sewage disposal, highways, streets and street lighting, and miscellaneous services. Where conferred, the governing body's lawmaking powers are generally exercised through the enactment of ordinances.

Of more direct relevance here, these units are almost always governed by elected bodies, although the method of election varies considerably. For counties and townships, the method is often determined by the State constitution or statutes, although sometimes the local unit has the option to change or to select its own system. The method of election for city councils is generally determined by the municipal charter.

[23] See generally 1 McQuillin, Municipal Corporations, chs. 2, 3 (1949); 2 *id.*, chs. 4, 7–10 (1966).

In 533 of the 3,049 counties, all members of the county governing boards are elected at large. In the other 2,516, some or all of the members are either elected by districts or are elected at large with district residence requirements.[24] Comparable statistics are not available for all municipalities and townships.[25] A 1965 survey of 3,052 cities with populations greater than 5,000 showed, however, that 62 percent elect all city council members at large, 21 per-

[24] The following chart is derived from Governing Boards of County Governments: 1965, 3:

Method of selection	Number of counties
All elected:	
At large	533
At large with district residence requirements	580
By districts	1,187
Presiding officer elected at large and others:	
At large with district residence requirements	40
By districts	668
Appointed	12
Other	31

For a State-by-State enumeration, see *id.* at 7. See also the grouping of States, as to methods of electing county governing boards, in the table contained in Appendix B–II (*infra*, pp. 138–139).

[25] A sampling of pertinent statutory provisions in 14 States having large numbers of townships, which accounted for 14,731 townships, showed that only in Wisconsin and Pennsylvania are members of township governing bodies elected by districts. States sampled were: Illinois, Indiana, Kansas, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Vermont, and Wisconsin. In some States townships are important units of local government, having substantial general powers, while in others they are quite limited in powers and functions.

cent elect all from districts, and 17 percent use a mixed system.[36]

B. SCHOOL DISTRICTS

As a general rule, school districts are initially established by the State, subject to annexation, consolidation or subdivision at the initiative of the residents or by the State itself. Although they are a "single-function" unit, the importance of their role in local government and the breadth of their powers warrant analysis separately from the other special-function units.[37]

School boards—the school districts' governing bodies—have corporate existence, generally determine their own budgets and levy taxes, and often have the power of eminent domain. In addition, they typically draw the boundaries for school zones within the dis-

[36] The Municipal Year Book 1966, 93–95. The 62-percent figure for at-large elections included 56 cities in which council members are nominated by districts.

[37] There has been a steady and dramatic decrease in the number of school districts in the United States in recent years. See 1962 Census of Governments, 4:

School year:	No. of school districts
1961–62	34,678
1959–60	40,064
1956–57	50,454
1951–52	67,355
1941–42	108,579

With the movement to consolidate school districts, particularly in rural areas, in many States, this trend is likely to continue in future years. Indeed, from 1962 to 1965 the number of school districts had further dropped from 34,678 to 28,814. The Council of State Governments, The Book of the States, 1966–1967, 287.

trict, determine school bus routes, control the acquisition and maintenance of plant and equipment, hire and promote faculty and administrative personnel, supervise the planning of curricula and extra-curricular activities, approve the purchase of texts and library books, authorize the use of school facilities for non-school functions and conduct programs to meet special educational needs. Some school boards function on a county-wide basis; others have a more narrowly circumscribed territorial jurisdiction.

No accurate statistics are readily available on the methods used in selecting school board members. However, it appears that over 95 percent are elected, the most notable exceptions being in certain large cities.[28] Moreover, the overwhelming majority of these are elected at large.[29]

C. SPECIAL DISTRICTS

Special districts exist apart from, and are superimposed upon, the regular and traditional governmental subdivisions. They are generally created through the action or at least with the approval of the residents or landowners in the district to be formed (which often cuts across city and county boundaries), and almost invariably under and pursuant to State statutes.

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[28] See "Individual State Descriptions" in 1962 Census of Governments, 243 *et seq.* An estimate is that about 33,000 of the 34,678 are elected.

[29] A sampling of States having large numbers of elected school boards showed that about 90 percent of these are elected at large. States sampled were: California, Illinois, Kansas, Minnesota, Missouri, Montana, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, Washington, Wisconsin, and Wyoming.

These districts are generally created to perform a single function, although occasionally they have a broad spectrum of local governmental purposes. The most common functions performed by such units are fire protection (17.6 percent), drainage and water conservation (16.5 percent), soil conservation (13.4 percent) and urban water supply (8.2 percent), but parks and recreation, hospitals, libraries, cemeteries, police protection and a variety of other categories of activity may also be undertaken by special districts. Special districts often are financed through bond issues and, where appropriate, charges for their services, but 9,457 out of the 18,323 in existence in 1962 had the authority to levy property taxes.

The governing board of a special district may be appointed by the Governor or other public officials, or it may consist of county board members or other elected officials serving *ex officio*, or it may be elected by the residents or landowners of the district. In about 9,600, or just over half of such districts, board members are elected, and it appears that a large majority of these are elected at large.[30]

Thus, while the total number of local governmental bodies is almost staggering, a quite smaller number of such bodies—about one quarter of the total—are

[30] See "Individual State Descriptions" in 1962 Census of Governments, 243 *et seq.* A sampling of a few States—Arizona, Arkansas, California, Idaho, Illinois, Nebraska, New Jersey, Oregon, Texas, and Washington—showed that 3,254 out of 4,936 elected governing boards (about 65 percent) are elected at large. A strong correlation exists between special district governing boards which are elected and those having the power to levy property taxes.

elected on a district basis.[21] As we have seen, many of these bodies are not elected at all, and a large percentage of the others are elected at large, and not by districts. Subjecting local governmental bodies to the equal-population principle of *Reynolds* would not, therefore, involve the great numbers supposed if, as we assume, the requirement would apply only where the members are elected on a district basis.[22]

In the succeeding pages we shall argue that, as a matter of consistent constitutional decision-making, logic, and sound policy, the equal-population principle developed in the State legislative apportionment cases is applicable to local governmental bodies whose members are elected by districts. Plainly, the Equal Protection Clause applies no less at the local than at the State level of government. No prior decisions of this Court have held the equal-population principle inapplicable to local governmental bodies. And no meaningful distinctions can be drawn between State legislatures and local bodies insofar as the relevance of the basic constitutional principles laid down in *Reynolds* v. *Sims* is concerned. In addition, the over-

[21] On the basis of available figures, coupled with rough estimates from samplings made of the situations in various States, it appears that only about 25 percent of the 91,185 local government governing boards are elected, in whole or in part, from districts or, while at large, under schemes including district residence requirements. See also the discussion *infra*, pp. 109–110.

[22] At best, therefore, claims of chaos and confusion because of the sheer number of bodies involved, if *Reynolds* is applicable at the local level of government, are grossly exaggerated, assuming such considerations are at all relevant. See the discussion in note 111, *infra*.

whelming trend in the State and lower federal courts is to hold the equal-population principle applicable at the local level. And, at least in the instant cases, there is no basis for distinguishing between the different kinds of bodies involved. Sound policy considerations support this result, when the role of local government in our democratic system is taken into account. Finally, we point out that, despite the large numbers of bodies potentially affected, applying the *Reynolds* principle at the local level would not create an unmanageable problem for the judiciary.

I. THE EQUAL-POPULATION PRINCIPLE OF REYNOLDS V. SIMS IS LOGICALLY APPLICABLE TO THE LOCAL LEVEL OF GOVERNMENT

In our view, the overriding issue in these cases is whether there are any distinctions between the State and local levels of government which make the equal-population principle of *Reynolds* v. *Sims*, 377 U.S. 533, inapplicable to local governmental bodies. In terms, of course, *Reynolds* and the companion cases construed and applied the Equal Protection Clause in regard to State legislative apportionment arrangements only. And no decision of this Court has definitively settled the question with respect to the local, as distinguished from the State, level of government. Properly considered, however, the applicability of the equal-population principle of *Reynolds* to the local level of government is compelled by logic and is required as a matter of consistent constitutional adjudication.

A. THE EQUAL PROTECTION CLAUSE APPLIES AT THE LOCAL GOVERNMENTAL LEVEL

No serious question can be raised as to the general applicability of the Equal Protection Clause to governmental units subordinate to the State. Actions of such subordinate governmental units have traditionally been regarded as constituting "State action" for Fourteenth Amendment purposes. For example, in *Standard Computing Scale Co.* v. *Farrell,* 249 U.S. 571, 577, the Court plainly stated:

> For the protection of the Federal Constitution applies, whatever the form in which the legislative power of the State is exerted; that is, whether it be by a constitution, an act of the legislature, *or an act of any subordinate instrumentality of the State exercising delegated legislative authority,* like an ordinance of a municipality or an order of a commission [emphasis added]. * * *

In *Cooper* v. *Aaron,* 358 U.S. 1, 16–17, in response to a contention that the actions of the school board and its agents were insulated from constitutional scrutiny since a local body and local officials were involved, the Court stated that "the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, * * * or whatever the guise in which it is taken * * *." Thus, what a State cannot constitutionally do directly, through its legislature, it cannot accomplish indirectly through the delegation of powers to political subdivisions. Again, in *Gomillion* v. *Lightfoot,* 364 U.S. 339, 344, the Court concluded that a State does not

have "plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations * * *." Holding that a redrawing of municipal boundaries on a racial basis deprived Negroes of their right to vote in violation of the Fifteenth Amendment, the Court observed that "[l]egislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution" (*id.* at 344–345). A contrary conclusion, stated the Court, "would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions" (*id.* at 345). Summarizing, the Court stated (*id.* at 347):

> When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.

Under these and a host of other pertinent authorities, it has been established beyond peradventure that governmental action on the local level, no less than on the State level, constitutes a subject appropriate for constitutional scrutiny under the Equal Protection Clause. Insofar as the general applicability of the Fourteenth Amendment to apportionment matters is concerned, therefore, it would seem to make little difference whether the apportionment at issue was one of State legislative seats or, instead, one involving a unit of local government.

B. NO PRIOR DECISIONS OF THIS COURT HOLD THE EQUAL PROTECTION CLAUSE INAPPLICABLE TO THE APPORTIONMENT OF LOCAL GOVERNMENTAL BODIES

It is occasionally suggested that this Court has previously determined that the Equal Protection Clause, and, more specifically, the equal-population principle of *Reynolds* v. *Sims*, is inapplicable to apportionment at the local level of government. Such a view is usually grounded on this Court's decisions in *Tedesco* v. *Board of Supervisors of Elections for the Parish of Orleans*, 339 U.S. 940; *Glass* v. *Hancock County Election Comm'n*, 378 U.S. 558, and *Griffing* v. *Bianchi*, 382 U.S. 15.[23] It is perhaps enough to note that none of these cases involved a decision on the merits, and that any reliance on them for a broad rule as to the inapplicability of the *Reynolds* principle to local government is refuted by the Court's noting probable jurisdiction in the instant cases. Nevertheless, a short discussion of these cases seems warranted, and shows that any reliance on them is misplaced.

Tedesco involved a challenge to the districting scheme pursuant to which members of the New Orleans City Council were elected, and was grounded primarily on the Privileges and Immunities Clause of the Fourteenth Amendment. Finding no violation of constitutional rights, the State courts dismissed the action (see 43 So. 2d 514 (La. Ct. App.)). An appeal to this Court was dismissed for want of

[23] See, *e.g.*, *Johnson* v. *Genesee County*, 232 F. Supp. 567, 569, 572 (E.D. Mich.); *Detroit Edison Co.* v. *East China Township School District No. 3*, 247 F. Supp. 296, 300–301 (E.D. Mich.). Compare *Delozier* v. *Tyrone Area School Board*, 247 F. Supp. 30, 33–34, 36 (W.D. Pa.).

a substantial federal question in 1950, long before this Court's decision in *Baker* v. *Carr*, 369 U.S. 186. In *Baker* the Court distinguished *Tedesco* by stating that it "indicates solely that no substantial federal question was raised by a state court's refusal to upset the districting of city council seats, especially as it was urged that there was a rational justification for the challenged districting" (369 U.S. at 235). *Tedesco* was of course one of the line of decisions following *Colegrove* v. *Green*, 328 U.S. 549; *Baker* completely undermined that line of authority, holding that apportionment suits should not be dismissed by federal courts for lack of jurisdiction or nonjusticiability or want of equity. In addition, Mr. Justice Clark, concurring in *Baker*, pointed out that "the Equal Protection Clause was not invoked in *Tedesco* * * *" (369 U.S. at 252, n. 2). And any attempted reliance on the *Baker* characterization of the *Tedesco* districting scheme as having a "rational justification" is, in our view, precluded by the substantive standards enunciated in *Reynolds*. Indeed, the *Baker* Court's handling of *Tedesco* provides, if anything, an affirmative indication that apportionment on the local level is a proper subject for adjudication in the federal courts.[34]

[34] In our view, questions as to subject-matter jurisdiction and justiciability in apportionment cases were definitively settled in *Baker* v. *Carr*, and under *Baker* no distinction can properly be drawn, in this regard, between an attack on the apportionment of State legislative seats and a challenge to districting for seats on a local governmental body. Almost invariably, the courts have so read *Baker*, and have taken jurisdiction and assumed justiciability in local government cases. Several courts have dismissed such suits for want of equity, however, or be-

Glass v. *Hancock County Election Comm'n*, 378 U.S. 558, although decided one week after this Court's decision in *Reynolds*, is likewise of little precedential force. *Glass* involved an appeal from a decision of the Mississippi Supreme Court upholding the dismissal for want of equity of a suit attacking the districting for seats on a county governing board (see 156 So. 2d 825 (Miss. Sup. Ct.)). This Court dismissed the appeal for want of jurisdiction and also denied certiorari. The State Supreme Court had indicated that Mississippi law required districting of county boards on a population basis, that an adequate remedy at law existed to compel redistricting, and that redistricting would in fact be accomplished once the county's population had stablilized (a NASA facility was in the process of being located in the county involved). While under *Lucas* v. *Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736–737, the availability of a political remedy is no justification for continued malapportionment, in the unique circumstances of the *Glass* case this Court's summary disposition can hardly be given great significance. Some two years later, in *Martinolich* v. *Dean*, 256 F. Supp. 612 (S.D. Miss), a federal court in Mississippi ordered redistricting of Hancock County's Board of Supervisors on a population basis, undeterred by this Court's previous action.

Finally, in *Griffing* v. *Bianchi*, 382 U.S. 15, the Court dismissed "for want of jurisdiction" an appeal

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cause the challenge to the districting was collateral in nature. And several have determined that the substantive standards of *Reynolds* v. *Sims* are inapplicable at the local level of government. See the discussion *infra*, pp. 50–59.

from a decision holding that the Equal Protection Clause applied to apportionment of local governmental bodies, but that the district court would stay its hand pending resort to the political process for correction of the existing malapportionment (238 F. Supp. 997 (E.D.N.Y.)). Dismissal for want of jurisdiction is plainly explicable on the ground that the appeal there taken was not from a final order. Indeed, had this Court disagreed substantively with the district court's holding, such a dismissal would be more difficult to explain.[35]

C. THE CONSTITUTIONAL PRINCIPLES ESTABLISHED IN REYNOLDS AND RELATED CASES ENCOMPASS LOCAL GOVERNMENTAL BODIES AS WELL AS STATE LEGISLATURES

As a matter of consistent and logical constitutional interpretation, the proposition that the equal-population principle of *Reynolds* applies to elected bodies of local government seems virtually self-evident. It would seem rather strange if a State's legislature were required to be apportioned on a population basis under the Equal Protection Clause, but its political subdivisions, exercising delegated State powers, were not subject to a similar constitutional requirement. Indeed, much of the language of the Court in its opinion in *Reynolds,* in articulating the basic constitutional principles, is fully applicable to units of local government. So, also, the fundamental principles shaped and enunciated in *Reynolds'* two pre-

[35] *Griffing* v. *Bianchi*, at a somewhat later stage, is of course before the Court presently as one of the instant cases, No. 491, and the Court's noting of probable jurisdiction seems to undermine whatever significance might be attributed to its earlier dismissal.

cursors, *Gray* v. *Sanders*, 372 U.S. 368, and *Wesberry* v. *Sanders*, 376 U.S. 1, are likewise relevant. In this triumvirate of constitutional decisions implementing substantively the adjudicatory framework grounded on *Baker* v. *Carr*, the Court spoke in broad terms of the right to vote and the nature of representative government.

In *Gray* v. *Sanders*, the Court, holding the Georgia county-unit system invalid, stated that "[t]he idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions" (372 U.S. at 380). In addition, it stated that "there is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the State" (*ibid.*). In *Reynolds* the Court characterized *Gray* as having "established the basic principle of equality among voters within a State," and as having "held that voters cannot be classified, constitutionally, on the basis of where they live, at least with respect to voting in statewide elections" (377 U.S. at 560).

In *Wesberry* v. *Sanders*, the Court held that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's" (376 U.S. at 7–8). In reaching that result the Court stated that "[t]o say that a vote is worth more in one district than in another would * * * run counter to our fundamental ideas of democratic government * * *" (*ibid.*). And, in language of no less applicability to the instant cases than to congressional districting, the Court added (*id.* at 17):

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

In *Reynolds* the Court referred to *Wesberry* as having "clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State" (377 U.S. at 560–561). This "fundamental principle" is just as applicable to the local level of government, in our view, as to the State and national levels.

The actual holding in *Reynolds* v. *Sims* was that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis" (377 U.S. at 568). But the Court's opinion expresses the basic constitutional concepts in such a way as plainly to encompass apportionment, representation and the right to vote at the local, as well as the State, level of government. Early in its *Reynolds* opinion the Court struck the note it was to follow consistently throughout (377 U.S. at 555):

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a

> debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Restrictions on the right to vote, resulting from unfair districting schemes, "strike at the heart of representative government" at the local level no less than in the election of State legislators. Just as in the State legislative apportionment cases, "the rights allegedly impaired are individual and personal in nature" (*id.* at 561), and here, too, "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights * * *" (*id.* at 562). Again, in language bearing directly on the malapportionment of bodies of local government whose members are elected from districts, the Court in *Reynolds* pointed out (*id.* at 563):

> Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. * * *

Government at the local level, through the medium of bodies whose members are elected by the people, is no less representative government than that involving State legislatures. As the Court in *Reynolds* stated (*id.* at 565):

> But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes

> of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. * * *

In our view, the full and effective participation of millions of Americans in representative government at the local level requires that they have an equally effective voice in the election of the members of local bodies. Like State legislatures, local governmental bodies "are responsible for enacting laws by which all citizens are to be governed," and should therefore "be bodies which are collectively responsive to the popular will" (*ibid.*). In regard to representation both at the local level and at the State level, "all voters, as citizens of a State, stand in the same relation regardless of where they live," and are thus entitled to "uniform treatment" insofar as apportionment and districting are concerned (*ibid.*). "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment" whether representation in a State legislature or in a local governmental body is involved (*id.* at 566).

Under the Court's formulation in *Reynolds*, "the basic principle of representative government" is that "the weight of a citizen's vote cannot be made to depend on where he lives" (*id.* at 567). This constitutional precept is, in our view, directly applicable to bodies of local government elected from districts,

and requires that those districts, like State legislative districts, be substantially equal in population. A contrary holding would not only result in a serious limiting of *Reynolds* and other voting rights cases but would run completely counter to the broad language and reasoning of the Court in that case. Continued malapportionment on the local level of government constitutes, we believe, an indefensible infringement of basic constitutional rights. In a sense, these cases involve the final step in the constitutional evolution that began with *Baker* v. *Carr*.[16] That this is actually a small step, and an almost unavoidable one, seems clear from a consideration of the constitutional principles laid down by the Court in *Reynolds*.[17]

[16] In his dissenting opinion in *Fortson* v. *Morris*, 385 U.S. 231, 242, Mr. Justice Fortas included a discussion of what he appropriately described as "the basic instrument of democracy—the vote," stating that this Court's apportionment and voting rights decisions "have reinvigorated our national political life at its roots so that it may continue its growth to realization of the full stature of our constitutional ideal" (385 U.S. at 249). Pointing out that "[i]t is the function—the office—the effect given to the vote, that is protected," he noted, in language no less applicable to local elections: "A vote is not an object of art. It is the sacred and most important instrument of democracy and of freedom. In simple terms, the vote is meaningless—it no longer serves the purpose of the democratic society—unless it, taken in the aggregate with the votes of other citizens, results in effecting the will of those citizens provided that they are more numerous than those of differing views. That is the meaning and effect of the great constitutional decisions of this Court" (*id.* at 250).

[17] A suggestion is sometimes made that certain language in the *Reynolds* opinion indicates a view on the part of the Court that the constitutional principles enunciated in that case are inapplicable to units of government subordinate to the State level. In the course of discussing and rejecting the so-called federal analogy, the Court stated (377 U.S. at 575): "Political

Several of the Court's post-*Reynolds* decisions involving voting rights also contain language of no little

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subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." Thereafter, the Court included a quote from *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178, relating to the broad powers of a State over local governmental units. Any reliance of this language for the proposition that the equal-population principle of *Reynolds* is inapplicable at the local level of government is, we submit, wholly misplaced. That language was directed solely to the question of whether local units of government bear the same relationship to State government as the States do to the federal government. The obvious conclusion was that they do not, and this provided one of the reasons for the Court's rejecting an argument that an analogy to the federal Congress could be relied upon as justification for apportionment of seats in one of the two houses of a bicameral legislature on a basis other than population. Not only the context of this language but also the concluding sentence of the paragraph in which it appears make its limited scope quite clear; the Court concluded the particular discussion by stating that "[t]he relationship of the States to the Federal Government could hardly be less analogous" (*ibid.*).

Insofar as the broad language of the *Hunter* case is concerned, any thought that *Hunter* could be relied upon for the proposition that constitutional principles are generally inapplicable to local units of government because of their dependence on the States for their very existence is plainly refuted by this Court's reading of *Hunter* in *Gomillion* v. *Lightfoot*, 364 U.S. 339. While recognizing "the breadth and importance" of a State's power "to establish, destroy, or reorganize by contraction or expansion its political subdivisions, to wit, cities, counties, and other local units" (364 U.S. at 342), the Court concluded, as to the limited meaning of *Hunter*, that "a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases" (*id.* at 344).

pertinence to the applicability of the equal-population principle of *Reynolds* to local governmental bodies.[38] In *South Carolina* v. *Katzenbach*, 383 U.S. 301, 337, which upheld the constitutionality of the Voting Rights Act of 1965, the Court stated, in regard to the participation of Negroes in the political process as newly enfranchised voters: "Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live." That the bright promise of that legislation might be effectively frustrated, at least in part, through malapportionment of local governmental bodies seems too plain to question. As we develop more fully later (*infra*, pp. 70–72), this consideration provides an added reason for holding *Reynolds* applicable to the local level of government.

It is of course irrelevant, though literally true, that there is no federal right to vote in local elections, in the sense that the federal Constitution does not require popular election, or election by districts, of members of local governmental bodies. Once a de-

[38] Nothing in the Court's decision in *Fortson* v. *Morris*, 385 U.S. 231, indicates, in our view, a retreat from *Reynolds*, at least insofar as its application to local governmental bodies is concerned. *Fortson* simply held the Equal Protection Clause, as construed in *Gray* v. *Sanders*, did not prohibit Georgia from having its legislature select its Governor from those two candidates receiving the most votes in a general election, where neither received the majority required under State law. In finding the challenged procedure constitutionally permissible, the Court concluded that nothing in the federal Constitution dictated "the method a State must use to select its Governor" (*id.* at 234). *Fortson* has no application where a State has established a system of election by districts to determine the composition of a governmental body.

termination is made that an elective system will be used, however, districting must be on a population basis. As this Court said in *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 665, holding Virginia's poll tax unconstitutional: "For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." Certainly a State can constitutionally provide that members of local governmental bodies are to be elected at large rather than by districts,[39] or shall be appointed rather than elected, so long as the appointment process is not a discriminatory one. Indeed, for that reason, the principle announced in *Reynolds* is simply inapplicable to many units of local government.[40] But where a State establishes and maintains a local governmental unit which can fairly be said to be intended to be representative in nature, where the State determines that such a body is to be comprised, in whole or in part, of members elected by the people, and where the State utilizes a system of election by dis-

[39] Except where a requirement of residence districts of unequal population is superimposed upon such an at-large election scheme. See *Fortson* v. *Dorsey*, 379 U.S. 433, 437–439, 441, and *Burns* v. *Richardson*, 384 U.S. 73, 88; see also the discussion *infra*, pp. 86–92.

[40] As discussed *infra* (pp. 109–110), the present structure of local governmental bodies is such that probably fewer than one quarter of the units presently in existence are so organized so as to fall within the category of bodies to which, in our view, the equal-population principle of *Reynolds* might be applied.

tricts for determining the members of such a body,[41] the equal-population principle, we submit controls. In that situation, the Equal Protection Clause requires that such districts be substantially equal in population, thus assuring the right to cast a properly weighted vote in local elections.

Narrowly construed, *Reynolds* v. *Sims* is a State legislative case, while the bodies whose apportionment is here at issue do not function statewide. But no differences in the nature of the governmental entities, nor in the elective process by which their members are determined, suggest that a contrary result should be reached in the instant cases. Where the State has given its citizens the right to expresss their collective will in designating the membership of a governmental body, it may not, consistent with *Reynolds'* construction of the Equal Protection Clause, classify them on any basis other than population. Those few courts which have found *Reynolds* inapplicable to local bodies and the defendants below in the instant cases have consistently sought to distinguish *Reynolds* on the facile ground that the governmental units involved were not State legislatures.[42] Such a distinction lies at the heart of virtually every argument which can be made against applying *Reynolds*

[41] By a "system of election by districts" we mean an arrangement under which members of local bodies are elected either directly or indirectly by those residing in various prescribed areas, or, although elected at large, have primary affiliations with a particlular segment of the electorate. See the discussion *infra*, pp. 86–92, 95–99.

[42] See the cases dismissed in notes 46 and 56, *infra*.

to the local level of government."[48] It is a distinction, we submit, having no constitutional significance in relation to the question here involved. The constitutional rule enunciated in *Reynolds* did not derive from factors inherent in or peculiar to State

[48] Among the arguments raised against applying *Reynolds* to local governments are suggestions that control over local elections is reserved to the States under the Tenth Amendment and is a matter within the "plenary power" of the States. Both suggestions are merely variations of the argument that the United States Constitution neither grants nor guarantees the right to vote in local elections. Although this is a truism the proposition that States may therefore confer the right of suffrage in an unequal manner is, because of the Fourteenth Amendment, a *non-sequitur*. The Tenth Amendment is simply declaratory of the relationship existing between the State and federal governments, and does not allow a State to exercise its reserved powers however it sees fit, in violation of personal and individual rights protected by the Fourteenth Amendment—indeed, that Amendment reserves powers not only to the States but also "to the people." And use of the term "plenary power" substitutes rhetoric for analysis and simply adds confusion. Plenary is not a synonym for absolute and the Fourteenth Amendment places qualifications and limitations on the scope of State authority. Although the State has the option of providing for elected or appointed local governmental bodies, it is without discretion to distribute the right to vote unequally among its electorate. And it is of no constitutional consequence that provisions of the State constitutions were involved in *Reynolds* and the accompanying cases, whereas State or local statutes are involved in these four cases—except to the extent that remedies can more easily be fashioned when complex constitutional amendment procedures need not be invoked. The impairment of the right to vote is just as acute whether the apportionment is accomplished by the State's constitution or by its statutes or by local laws.

It is also argued that *Reynolds* is distinguishable because States have "sovereignty"—having retained all which was not relinquished to the federal government—while local units are mere political subdivisions, created by the State and exercising

legislatures. In *Baker* v. *Carr*, the Court expressly rejected the argument that apportionment questions were constitutionally cognizable under the Guaranty Clause (369 U.S. at 218–226, 228–229). Rather, under and since *Baker*, it has been the Equal Protection Clause which has provided the constitutional touchstone for assaying the fairness of the relationship between the composition of a governmental body and the individual voter. No significant difference exists, in our view, between the elective process at the State, as distinguished from the local, level.[44] At whatever level, such a system of election contemplates representation of the applicable constituency in the body being elected. It is the right to vote for mem-

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delegated authority. But again the distinction is without constitutional relevance to the issue presented here. Sovereignty is an elusive concept, at best, and can be exercised only by agents of the State. It cannot be that the State legislature exercises sovereignty when it apportions itself but not when it apportions local governmental bodies or delegates that task to the local units. In each instance, it is the State which acts and such action is similarly subject to scrutiny under the Equal Protection Clause, which says nothing about sovereignty.

[44] That the States are sovereign entities, and that they exercise inherent and not delegated powers, under the Tenth Amendment, were not relevant considerations insofar as the conclusions reached by the Court in *Baker* and *Reynolds* are concerned (see 377 U.S. at 564, 574). Arguments that local governmental bodies are outside the equal-population principle of *Reynolds* since they are not sovereign (some constitutional home-rule municipalities do have incidents of sovereignty, however) and exercise delegated powers as creatures of the States are thus, in our view, inapposite in regard to whether the Equal Protection Clause requires the election of the members of such bodies from equally populated districts, when an election-by-district scheme is established under State law.

bers of a representative body which is given Fourteenth Amendment protection in *Reynolds*. If the Equal Protection Clause requires that State legislators be elected from equally populated districts, it requires, by the same token, that members of local bodies be elected on a similar basis.

D. THE TREND OF AUTHORITY IN THE STATE AND LOWER FEDERAL COURTS OVERWHELMINGLY SUPPORTS APPLICATION OF THE REYNOLDS' EQUAL-POPULATION PRINCIPLE TO LOCAL GOVERNMENTAL BODIES

Litigation challenging the apportionment of local governmental bodies has, in the wake of *Baker* and *Reynolds*, reached substantial proportions.[45] Significantly, the conclusion reached by an overwhelming number of courts which have considered the matter is that the equal-population principle of *Reynolds* applies no less at the local than at the State level of government. At least seven State courts of last resort which have considered the question have reached that conclusion,[46] and provide convincing support for

[45] As an aftermath of *Reynolds* and the companion cases, cases involving challenges to the distribution of voting strength for the election of members of local governmental bodies have been decided in more than 30 State and federal jurisdictions. A predominant number of these cases have involved county governing boards, a lesser number city councils, still fewer county school boards, and several other sorts of local bodies (see the discussion, *infra*, pp. 49–51).

[46] California, New York, Wisconsin, Minnesota, Maryland, Missouri and South Dakota, in the following decisions: *Miller* v. *Board of Supervisors*, 405 P. 2d 857 (Calif. Sup. Ct.); *Seaman* v. *Fedourich*, 209 N.E. 2d 778 (N.Y. Ct. App.); *State ex rel. Sonneborn* v. *Sylvester*, 132 N.W. 2d 249 (Wis. Sup. Ct.); *Hanlon* v. *Towey*, 142 N.W. 2d 741 (Minn. Sup. Ct.); *Montgomery County Council* v. *Garrott*, 222 A. 2d 164

the position here taken. Both the tide of decision and the analysis and reasoning which have led the State courts in this direction argue persuasively, we submit, that this Court should approve and endorse the efforts being made to give vitality and consistent application to the principles enunciated in *Reynolds*."[47]

(Md. Sup. Ct.); *Armentrout* v. *Schooler*, 409 S.W. 2d 138 (Mo. Sup. Ct.); *Bailey* v. *Jones*, 139 N.W. 2d 385 (S. Dak. Sup. Ct.).

Insofar as we can determine, only two State courts of last resort have reached an inconsistent result. In *Brouwer* v. *Bronkema*, 141 N.W. 2d 98, and *Knudsen* v. *Klevering*, 141 N.W. 2d 120, the Michigan Supreme Court divided evenly, the effect of which was to uphold the challenged arrangements against constitutional attack (see 141 N.W. 2d at 123). And in *Avery* v. *Midland County*, 406 S.W. 2d 422, pending on petition for certiorari, No. 958, this Term, the Texas Supreme Court held *Reynolds* inapplicable in a case involving a county governing board apportioned on a basis grossly disproportionate to population, although finding the existing districting arbitrary and irrational on State law grounds. In *People* v. *O'Neill*, 210 N.E. 2d 526, the Supreme Court of Illinois held that the apportionment of a county governing board could not be collaterally attacked by asserting its alleged malapportionment in defense of an action to recover unpaid taxes, relying on the *de facto* doctrine and without reaching the question of the application of the equal-population principle at the local level. Similarly, in *Davis* v. *Dusch*, 139 S.E. 2d 25, at an earlier stage of the litigation involved in one of the instant cases, No. 724, the Virginia Supreme Court of Appeals denied mandamus seeking to compel reapportionment of city council seats, on State law grounds and without reaching or discussing any federal constitutional questions.

[47] Several courts have, however, determined to await direction from this Court as to whether *Reynolds*' equal-population principle applies at the local level of government. Included in that group are the lower federal courts in two of the instant cases, Nos. 430 and 624, both splitting two-to-one on that question, and the Michigan Supreme Court in the cases cited in note 46, *supra* (see 141 N.W. 2d at 107, 119–120, 121–123). See the discussion in note 54, *infra*.

A notable example is the decision of the New York Court of Appeals in *Seaman* v. *Fedourich*, 209 N.E. 2d 778.[48] In that case, involving a challenge to the districting for election of members of the Binghamton Common Council, the court stated (209 N.E. 2d at 782) that "[t]here can be little doubt * * * that [the 'one person, one vote'] principle is applicable to elective legislative bodies exercising general governmental powers at the municipal level * * *." It reasoned (*ibid.*):

> It is axiomatic that local governmental units are creations of, and exercise only those powers delegated to them by, the State * * * and, cer-

[48] Local government in New York has been undergoing a veritable revolution, insofar as the correction of existing malapportionment is concerned, in the wake of *Reynolds*, spurred on by the Court of Appeals' decision in the *Seaman* case. Most of the litigation has involved county boards of supervisors, but city councils have been concerned also in some of the cases. State court decisions on local government apportionment in New York include: *Goldstein* v. *Rockefeller*, 257 N.Y.S. 2d 994 (Sup. Ct., Monroe Co); *Augostini* v. *Laskey*, 262 N.Y.S. 2d 594 (Sup. Ct., Broome Co.); *Barzelay* v. *Board of Supervisors*, 263 N.Y.S. 2d 854 (Sup. Ct., Onondaga Co.); *Treiber* v. *Lanigan*, 264 N.Y.S. 2d 797 (Sup. Ct., Oneida Co.); *Dona* v. *Board of Supervisors*, 266 N.Y.S. 2d 229 (Sup. Ct., St. Lawrence Co.); *Town of Greenburgh* v. *Board of Supervisors*, 266 N.Y.S. 2d 998 (Sup. Ct., Westchester Co.); *Shilbury* v. *Board of Supervisors*, 260 N.Y.S. 2d 931 (Sup. Ct., Sullivan Co.), affirmed *per curiam*, 267 N.Y.S. 2d 1022 (App. Div.); *Davis* v. *Board of Supervisors*, 273 N.Y.S. 2d 133 (Sup. Ct., Clinton Co.); *Graham* v. *Board of Supervisors*, 267 N.Y.S. 2d 383 (Sup. Ct., Erie Co.), affirmed, 273 N.Y.S. 2d 419 (Ct. App.); *Morris* v. *Board of Supervisors*, 273 N.Y.S. 2d 453 (Sup. Ct., Herkimer Co.). Several lower federal court decisions involving subordinate New York units of government are discussed *infra*, pp. 53–54. See also *Lodico* v. *Board of Supervisors*, 256 F. Supp. 442 (S.D.N.Y.).

tainly, if the latter may exercise its legislative powers only in a body constituted on a population basis, any general elective municipal organ to which it delegates certain of its powers must, by a parity of reasoning, be subjected to the same constitutional requirement. Viewed in another way, if, as seems evident, the thrust of the Supreme Court's decisions is that it is inherent within the concept of "equal protection" that a person has a substantial right to be heard and to participate, through his elected representatives, in the business of government on an equal basis with all other individuals, no reason or justification exists for differentiating, so far as that right is concerned, between the general governmental business carried on in the highest legislative organs of the State and that conducted, by virtue of a delegation of authority, in municipal law-making bodies."

Also worth noting is the statement of the Attorney General of New York, set out in *Goldstein* v. *Rockefeller*, 257 N.Y.S. 2d 994, 1000–1001 (N.Y. Sup. Ct., Monroe Co.), that "the trials, inconvenience and evil of upheaval due to the application of the * * * [equal-population principle] are less to be feared, if

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"See also the lower court opinion in *Seaman*, stating (258 N.Y.S. 2d 152, 155): "That the 'one person, one vote' principle is applicable to the apportionment of elected members of legislative bodies of governmental units below the level of state legislatures can no longer be doubted"; and see *Shilbury* v. *Board of Supervisors*, 260 N.Y.S. 2d 931, 935 (Sup. Ct., Sullivan Co.), referring to "a recent avalanche of judicial opinion definitely indicating [the] constitutional invalidity" of a local government apportionment scheme not based on population, and *Morris* v. *Board of Supervisors*, 273 N.Y.S. 2d 453, 455 (Sup. Ct., Herkimer Co.).

met with intelligence, cooperation and good will, than the evil of a constantly increasing and more acute imbalance of representation of citizens in their local legislative bodies due to the failure to apply the proposition."

California, our most populous State, has joined New York, the second largest, in applying *Reynolds* to local governmental bodies. In *Miller* v. *Board of Supervisors*, 405 P. 2d 857, 860, the California Supreme Court stated: "Although we are not here dealing with voting apportionment at the level of the state legislature, * * * no reason appears why equal protection assures representative voting to the electors of the State of California as a whole but not of the County of Santa Clara." Subsequently, in *Wiltsie* v. *Board of Supervisors*, 419 P. 2d 440, that court, in another county board apportionment case, noted that its holding in *Miller* was grounded not only on a State statutory provision, but "more particularly on the constitutional mandate of the equal protection clause * * *".[*]

One of the earlier State court decisions holding the equal-population principle applicable to local governmental bodies is that of the Wisconsin Supreme Court in *State ex rel. Sonneborn* v. *Sylvester*, 132 N.W. 2d 249. In the face of various arguments for inapplicability, that court stated that "[t]he right to vote whether statutory or constitutional to mean anything

[*] Several earlier California Supreme Court decisions in county board apportionment cases were grounded on State not federal law. See *Griffin* v. *Board of Supervisors*, 384 P. 2d 421, 388 P. 2d 888; *Henderson* v. *Superior Court of Marin County*, 390 P. 2d 206.

in a representative government means the right to secure equal representation," and that "county boards possessing the type of legislative power which they do must be considered a unit of government which should be equally representative of the people of the county" (132 N.W. 2d at 255). That county boards are statutory creatures of the legislature, the Wisconsin court continued, is "not determinative of whether the 14th Amendment applies to their composition when the members of a county board are determined by the elective process" (*ibid.*).[21] It concluded (*id.* at 255, 256):

> Since the basic principle of representative government is that the weight of a citizen's vote cannot be made to depend on where he lives, then county boards as units of representative government should not be constitutionally immune from the requirements of the 14th Amendment. * * *
>
> * * * Since the composition of the legislature must conform to the principle of equal representation, it is logical that the arm or political subdivision of such legislature enacting legislation should be governed by the same principle of equal representation.

In *Bailey* v. *Jones,* 139 N.W. 2d 385, the South Dakota Supreme Court, after considering *Baker* and

[21] In the course of its opinion the Wisconsin court posed this question (132 N.W. 2d at 256): "Can it be successfully argued today that the legislature could provide for the election of supervisors of the county board on the basis of race, creed, or color? We think not. Nor do we believe that an increase or dilution of the weight of votes on the basis of political subdivisions or of the character of the area in which people live can be justified by the plenary-power argument."

Reynolds and discussing the functions and powers of county governing boards in that State, concluded (139 N.W. 2d at 388):

> Boards of County Commissioners are representative of the people and by parity of reasoning the concepts of equal protection as delineated by, and in conformity with, the decisions of the United States Supreme Court applies to them.

Likewise, in concluding that the Equal Protection Clause requires districts for the election of members of county governing boards to be equal in population, the Minnesota Supreme Court stated, in *Hanlon* v. *Towey*, 142 N.W. 2d 741, 745:

> Despite the absence of any specific constitutional provision requiring apportionment of state legislative districts on an equal-population basis, these decisions [*Baker*, *Gray*, and *Reynolds*] make it unmistakably clear that the site of a citizen's home—like race, creed, or color, and most recently, affluence—does not afford a permissible basis for distinguishing between qualified voters within the state. While it is true that no decision of the United States Supreme Court has yet applied the equal protection principle to "local legislative bodies in a state," there is every indication that the right to vote for representatives upon a county board as presently constituted in our state does have constitutional significance. The language of the decisions affords appellants little comfort and indeed no discernible support for their claim that the legislative power over apportionment of voters vested with the electoral control

> of county government is absolute, untrammeled by constitutional restraint.

While noting that the legislature could withdraw county government from electoral control and provide for the appointment of local officials, the Minnesota court observed that "so long as the present system of a representative form of government is maintained, the fundamental nature of the right to vote inescapably requires the application of fundamental principles" (*id.* at 746).

Two rather recent decisions of the Maryland Court of Appeals—*Montgomery County Council* v. *Garrott*, 222 A. 2d 164, and *Gray* v. *Board of Supervisors of Elections of Baltimore County*, 222 A. 2d 176—held the equal-population principle of *Reynolds* applicable to local governmental bodies. In its opinion in the *Montgomery County Council* case, the Maryland court concluded (222 A. 2d at 166): "There remains little doubt that the one man, one vote principle, so fully articulated in Reynolds v. Sims, * * * is now applicable to political subdivisions of a state."

Finally, in *Armentrout* v. *Schooler*, 409 S.W. 2d 138, the Missouri Supreme Court, observing that the city council involved in that litigation exercised general governmental powers, stated (*id.* at 143):

> The fact that cities are created by the legislature, do not derive their power from the people affected, and occupy a subordinate position in the hierarchy of government does not detract from the principle that in a representative government the people are entitled to equal representation. As a matter of logic voters selecting their representatives to sit on a municipal leg-

islative body are entitled to the same equal protection in the exercise of their right of suffrage as that enjoyed by voters on the state level selecting their state senators and representatives in the state and national legislative bodies; are entitled to full and equal voice in the choice of their representatives on the city council without dilution or diminution of the weight of their individual votes because of the ward in which they happen to reside."[82]

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[82] Mention should also be made of several lower court decisions which contain a discussion of the question of the applicability of the equal-population principle to local governmental bodies. In *Brouwer* v. *Bronkema*, 13 Court Decisions on Legislative Apportionment (National Municipal League) (hereinafter "C.D.L.A.") 81 (Kent Co., Mich. Cir. Ct.), subsequently reviewed and reversed by an evenly divided Michigan Supreme Court (141 N.W. 2d 98, 123; see note 46, *supra*), a careful articulation of the constitutional principles is set forth. In that opinion, in what appears to be the first local government case to reach judgment after this Court's decision in *Reynolds*, the Circuit Court found "persuasive" the argument that the Equal Protection Clause requires that county board seats must be apportioned on a population basis. In support of this conclusion, several analytical steps were relied upon (13 C.D.L.A. at 95): 1) "The Fourteenth Amendment applies to the State and to every governmental agency or instrumentality of the State which exercise powers delegated to it by the State"; 2) "The County is a governmental instrumentality or division of the State and the board of supervisors is the legislative body of the County. That board exercises legislative powers delegated to it by the State"; and 3) "The State may exercise its legislative powers only in a legislative body apportioned on a population basis and if it delegates a part of those powers, it must do so to a legislative body apportioned to the same 'basic constitutional standard'." Repeated reference has been made to this reasoning by other courts considering the question. The remaining part of the circuit court's lengthy opinion involves a detailed consideration and refutation of various contrary arguments made against the applicability of the equal-population

Lower federal as well as State courts have been involved in local government apportionment controversies during the past few years, and the trend of decision in those courts has been the same. Several of these federal court decisions, apart from those in the instant cases, are worth noting in regard to the analysis utilized in concluding that the equal-population principle applies at the local level of government. In *Ellis* v. *Mayor and City Council of Baltimore*, 234 F. Supp. 945 (D. Md.), decided several months after this Court's decision in *Reynolds*, the district court assumed the applicability of the equal-population principle to local governmental bodies, and stated (234 F.

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principle to local bodies. In concluding, that court stated (13 C.D.L.A. at 112): "It is the 'supreme law of the land' that each 'person' have equal representation in the legislative body in which the legislative power of the State is exercised and such right requires that the membership of such body be apportioned on a population basis. A part of the legislative power of the State is delegated to and exercised by County Boards of Supervisors. That Board, like its parent body, the State Legislature, must be apportioned on a population basis if all persons in the County are to have equal representation therein."

Similarly, the decision of the Superior Court of New Jersey, Chancery Division, in *Mauk* v. *Hoffman*, 209 A. 2d 150, should be mentioned. Holding that the equal-population principle applies to county governing boards, and that the boards of three counties there at issue were "clearly malapportioned," that court stated that "[i]t could not seriously be contended otherwise," and continued (209 A. 2d at 152): "Since the basic principle of representative government, as stated in the Reynolds case, * * * is that the weight of a citizen's vote cannot depend on where he lives, the composition of the boards of freeholders should comply with the Fourteenth Amendment. A county is generally considered a political subdivision or agency of the State. * * * If the State Legislature must conform to the principle of equal protection, it is logical that the 'county legislature' should conform to the same principle."

Supp. at 950): "Manifestly, plaintiff's right to equal protection of the laws in his representation in the City Council is being presently denied * * *." In affirming that decision, the Fourth Circuit Court of Appeals, the only federal appellate court to pass directly on the question of the applicability of *Reynolds* to local government apportionment,[*] stated that the relevance of the Equal Protection Clause to districting for city council seats "could not successfully be * * * contested in this appeal, for the 'one man, one vote' principle * * * logically applies to councilmanic no less than to statewide apportionment" (352 F. 2d 123, 124).

In *Delozier* v. *Tyrone Area School Board*, 247 F. Supp. 30, 34–35 (W.D. Pa.), the court explained its

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[*] In *Lynch v. Torquato*, 343 F. 2d 370, the Third Circuit found the equal-population principle inapplicable to a political party's local committee organization, a matter discussed in note 110, *infra*. But see 343 F. 2d at 372, where that court stated: "But the citizen's constitutional right to equality as an elector, as declared in the relevant Supreme Court decisions, applies to the choice of those who shall be his elected representatives in the conduct of government * * *." Also, in *Simon* v. *Landry*, 359 F. 2d 67, the Fifth Circuit reversed and remanded a district court decision not to convene a three-judge court in a local government apportionment case (see *Simon* v. *Lafayette Parish Police Jury*, 226 F. Supp. 301 (W.D. La.)), without reaching the constitutional questions involved (359 F. 2d at 68), and certiorari was denied by this Court, 385 U.S. 838. *Simon* is discussed further in notes 56 and 131, *infra*. Of course, in one of the instant cases, No. 724, the Fourth Circuit, following its holding in the *Ellis* case, again applied the equal-population principle to a local governmental body, there the Virginia Beach City Council (see the discussion *infra*, pp. 84–92).

reasons for applying the equal-population principle to the election of school boards:

> Nor do we believe that the status of a local school district, being an arm or agency of the state legislature to administer its educational system makes it immune from the constitutional requirement. Admittedly the state legislature could administer its school system other than by local elective boards. * * *
>
> [But] [t]he legislature of the State of Pennsylvania has delegated the management of its educational system in local areas to local school boards. These boards, in the c[illegible] of school district in the present case, and in most other classes, are elected by popular vote. The state has also delegated to such boards the power to levy taxes, and in most local communities the various taxes levied by the school boards are the largest local tax imposition. While school boards are subject to numerous limitations in the exercise of local powers, these limitations are no less in scope or variety than the limitations imposed on other governmental subdivisions or municipal corporations. * * *

In the sequel to the earlier *Glass* case (see *supra*, p. 28), *Martinolich* v. *Dean*, 256 F. Supp. 612 (S.D. Miss.), the court concluded that "plaintiffs are entitled to have this court require that the shocking disparity of population among the supervisors' districts of Hancock County be corrected" (*id.* at 616), and stated that "[i]t is a sad commentary on local political leadership that this situation, which we find to be invidious discrimination within the meaning of *Baker* v. *Carr* and its progeny, must now be

dealt with by a federal court rather than by the people and officials of Hancock County, Mississippi" (*id.* at 614–615). Similarly, in a federal court case involving a Mississippi county governing board, Judge Mize, in an unreported decision (*Damon* v. *Lauderdale County Election Comm'rs,* 13 C.D.L.A. 140 (S.D. Miss.)), concluded that "the Fourteenth Amendment is applicable to redistricting counties as well as the legislatures of the various states," relying extensively on the earlier Michigan circuit court decision and opinion (discussed in note 52, *supra*).

In *McMillan* v. *Wagner,* 21 C.D.L.A. 102, 109 (S.D.N.Y.), the court stated:

> We conclude that the Fourteenth Amendment allows no distinction between a New York State resident's right to be equally represented in the State Legislature, and a New York City resident's right to be equally represented on the Board of Estimate. Both residents are given by New York law the right to vote for representatives to a body possessing state governmental powers. When this governmental body meets, the Fourteenth Amendment requires that each citizen be afforded equal representation.

And in *Blaikie* v. *Wagner,* 258 F. Supp. 364 (S.D.N.Y.), although upholding the districting for seats in the New York City Council despite some departures from population-based representation, the district court nevertheless stated (258 F. Supp. at [redacted]):

> Although there were decisions of the Supreme Court which would have supported a contrary result and although persuasive arguments can

> be made to the effect that government at such levels should be by the people and not by the judiciary, the decisions of various courts, State and Federal, so overwhelmingly point to the [equal-population] principle's application at County and City levels that in *Bianchi* this particular Rubicon was crossed. Furthermore, logic, for whatever merit it may have in this situation, is persuasive against a re-crossing. Concededly, the City Council is the legislative body enacting laws affecting the lives of over eight million people—a population far greater than that of many States.

Finally, in *Strickland* v. *Burns*, 256 F. Supp. 824 (M.D. Tenn.), a county school board apportionment case like *Delozier* (discussed *supra*, pp. 51–52), the district court rejected the argument that the Equal Protection Clause "does not require that local representative government, or at least a local representative governmental body which is primarily administrative rather than legislative in character, conform to the 'one man, one vote' standard of Reynolds v. Sims * * *" (*id.* at 825), and stated (*id.* at 826):

> In *Reynolds* and the related cases, the Supreme Court held that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people and that any system of apportionment by which the weight of a citizen's vote is diluted when compared with the votes of citizens living in other areas is violative of rights secured by the Equal Protection Clause. *Reynolds* was decided in the context of state legislative apportionment and * * * the Court emphasized the fact that state legislatures are, historically, the

> fountainhead of representative government in this country. Nevertheless, the rationale of the *Reynolds* decision, that is, that it constitutes invidious discrimination to dilute the efficacy of votes because of the residence of the voters, is logically as applicable to the backwaters of representative government at the local level as to the fountainhead of representative government at the state level.

Concluding, the court stated (*id.* at 827):

> * * * [W]e can find no basis for applying the "one man, one vote" rule to the congeries of powers possessed by the Legislature itself and at the same time denying its application to a subordinate body simply because it possesses a fractional part of those powers, so long at least as the fractional part cannot be said to be insignificant or unimportant * * *.

Some of the opinions in the instant cases likewise elaborate the reasons for concluding that the equal-population principle of *Reynolds* applies at the local level of government. In the Suffolk County case, for instance, the court stated (R. 491; 134): "In county-wide administration, just as in state-wide administration, the inhabitants of the populous areas should not be governed by representatives drawn from other and thinly populated areas." It added (R. 491; 134):

> It is not for this court to speculate about the type of representative government Suffolk County should have. Suffice it to say that the Board of Supervisors is constituted to serve as the legislative body for the County and, under the present undisputed population disparity, it is not representative of the voters

of the County as the Supreme Court has indicated is required of legislative bodies under the Equal Protection Clause.

Similarly, in the Virginia Beach City Council case, the Fourth Circuit concluded (R. 724; 119): "The principle of one-person-one-vote extends also to the level of representation, and exacts approximately equal representation of the people—that each legislator, State or municipal, represent a reasonably like number in population."

In the other two pending cases, Nos. 430 and 624, the three-judge courts split two-to-one on the question of the present applicability of the equal-population principle to local governmental bodies. In both instances the majority relied heavily upon the fact that this Court had not yet passed upon the issue.[*] In

[*] In No. 430 the majority noted that "[t]he matter of malapportionment of boards and agencies of the states and their subsidiaries has not yet been before the United States Supreme Court" (R. 430; 220), and stated: "We recognize that the Supreme Court of the United States may at some time in the future reach the conclusion that the District Courts of the United States have the power and duty to prescribe guide lines for the selection of the many boards and commissions created and organized in connection with local government. We are satisfied that the Supreme Court of the United States has not yet reached that point. We are satisfied that we should not anticipate that the Supreme Court will reach that point" (R. 430; 221). Similarly, in No. 624 the majority stated (R. 624; 62): "It is not for us to forecast the likelihood that the Supreme Court will ultimately extend the principles of *Reynolds* * * * to the tens of thousands of subordinate political units of the states to which have been delegated some power to which the label 'legislative' may be attached. Some courts have essayed to do so, while others have been content to await the development of judicial standards in this comparatively uncharted area of constitutional law. A warning to make haste slowly may be read into refusal by the Supreme Court on two occasions to

both there were thoughtful and vigorous dissents developing the reasons supporting the applicability of *Reynolds* at the local level."

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consider cases [citing *Glass* and *Tedesco*, discussed *supra*, pp. 26–28] involving the contention that the federal constitution requires local governmental bodies below the state level apportioned on a population basis." On the other hand, it is fair to say that both of the panel majorities inclined toward the view that the equal-population principle of *Reynolds* should not be held applicable at the local level (see R. 430; 221; R. 624; 64).

"In No. 430, Judge Fox explained his views as follows (R. 430; 214-215):

"We are not here concerned with the nature or structure of governmental units as such. The relevance of "one man, one vote" to the present case is not an extension of the rule laid down by *Reynolds* v. *Sims* * * *, but, rather it is a precise application of *Reynolds* to its intended purpose—to secure a constitutionally protected right to individual citizens. Under the authority of *Reynolds* and other decisions of the United States Supreme Court * * *, I can see no warrant to arbitrarily cut off the citizens' right to fair representation at the county level.

"Since the majority opinion differs substantially as to the consequences of my conclusion, it may be well at this point to indicate exactly what is and what is not involved here. This is not a situation in which the legislature has appointed a commission or board—no one is contending for a right to vote for appointed officials. The legislature has not chosen to appoint Boards for each of the Intermediate School Districts in the State of Michigan, in which case the function of providing for public education would be delegated, but not, legislatively speaking, the responsibility. For in that situation, the legislature would have delegated the function of providing for public education, but the appointees would have been directly responsible to the legislature, an equally apportioned body directly responsible to the people.

"But here the legislature has delegated not only the function, but also the responsibility, which would not be objectionable but for the gross malapportionment in the existing

A comprehensive review of the pertinent State and lower federal court decisions[**] thus indicates that the overwhelming weight of authority supports the view

system of selecting the Board. For under that system the members of the Board are not directly responsible to the legislature, but to the people by reason of the vote which the legislature has given them * * *. Since the vote is not given on a fairly apportioned basis, the responsibility is fractionalized, and the Board is, in effect, more responsible to the minority than to the majority.

In the Alabama county board case, Judge Johnson stated (R. 624; 65–66):

I think the conclusion is inescapable that the principles of *Reynolds* v. *Sims*—that is, the principles of equality among voters within a state and the fundamental precept that representative government is one of equal representation for an equal number of people without regard to race, sex, economic status, or place of residence—apply to these local organs of government. These boards of revenue perform important governmental functions, and are designed to be controlled by the voters over which they have jurisdiction. * * * [I]n discharging their duties, the boards are no less representative or reflective of the views of the citizens because they are smaller than the state unit. To the contrary, rather than limit the principles of *Reynolds*, as the majority opinion does, it would seem that these principles might well have their most meaningful application at the local level. Viewed another way, if, as seems evident, the thrust of the Supreme Court decisions is that it is inherent within the concept of "equal protection" that a person has a substantial right to be heard and to participate, through his elected representatives, in the business of government on an equal basis with all other individuals, no reason or justification exists for differentiating so far as that right is concerned, between governmental business carried on at the state level and that conducted on the local level.

[**] Apart from the cases previously discussed, a few lower federal courts have concluded that the equal-population principle does not apply to local governmental bodies. See *John-*

that the equal-population principle of *Reynolds* is applicable to local governmental bodies. And the analysis and reasoning engaged in by these courts convincingly demonstrate that this is the only logical and constitutionally sound conclusion, and that no meaningful distinction can be made, in terms of the requirements of the Equal Protection Clause, between the right to vote in State legislative and in local governmental elections.

E. A BREAK WITH REYNOLDS IN THE INSTANT CASES WOULD HAVE UNFORTUNATE CONSEQUENCES

The results flowing from a determination that the equal-population principle of *Reynolds* does not apply to local governmental bodies would, in our view, be

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son v. *Genesee County*, 232 F. Supp. 567 (E.D. Mich.), where, while the challenge to the county board apportionment was in the nature of a collateral attack, and could have been disposed of on that ground, the court went ahead and stated that, in its view, *Reynolds* was inapplicable at the local level of government (*id.* at 569–572); *Detroit Edison Co.* v. *East China Township School District No. 3*, 247 F. Supp. 296 (E.D. Mich.), similarly involving a collateral attack on the composition of a body of local government, where the court did not reach the specific constitutional question, but implied that, in its view, *Reynolds* should not be applied to local governmental bodies (*id.* at 300–301). See also *Simon* v. *Lafayette Parish Police Jury*, 226 F. Supp. 301 (W.D. La.), where the court, prior to this Court's decision in *Reynolds*, apparently concluded that the challenged districting scheme was not constitutionally defective. In reversing and remanding for the convening of a three-judge court, *sub nom. Simon* v. *Landry*, 359 F. 2d 67, 68, the Fifth Circuit noted that "[o]n a further hearing the district court determined that the equal protection one man-one vote principle of Reynolds * * * does not extend to subordinate governmental instrumentalities such as the Police Juries of Louisiana Parishes' [county governing authorities]."

undesirable and unfortunate. A serious and lasting constitutional anomaly would be created: a citizen's vote could be diluted at the local level but not at the State level. A citizen would have a constitutionally protected right to population-based representation in his State legislature, but not in the organs of government which stand closest to him—his county board or city council or school board. Malapportionment at the local level of government would be perpetuated indefinitely.[57] An opportunity to circumvent the full thrust of *Reynolds* would be given to State legislatures; they could delegate the exercise of significant

[57] Not unlike the malapportionment of many State legislatures (see *Reynolds*, 377 U.S. at 569–570), malapportionment of local governmental bodies goes far back into history in some instances. For example, in Hancock County, Mississippi, where the apportionment of the county governing board was challenged in the *Glass* and *Martinolich* cases, the last previous redistricting had occurred over 100 years earlier (see 156 So. 2d at 826), despite a State statute which required that counties be divided into five supervisors' districts "with due regard to equality of population * * *" (see 256 F. Supp. at 613, n. 1). And in the *Armentrout* case the court noted that the challenged districting for city council seats had "continued without change for more than 75 years" (409 S.W. 2d at 141).

Similarly, disparities from population-based representation at the local level are often greater than those existing, prior to *Reynolds* and its wake, in even the most malapportioned State legislatures. In one of the instant cases, for instance, a population-variance ratio of in excess of 100-to-1 existed between the most and the least populous districts electing members of the county governing board (R. 491; 126). And in the *Avery* case, No. 958, only five percent of the county's population resided in districts electing a majority of the members of the county governing board (see 406 S.W. 2d at 424). Other like examples of gross disparities from a population basis, too numerous to mention, are presented in many of the local government apportionment cases heretofore discussed.

powers to malapportioned local bodies (see Judge Fox's dissent in No. 430 (R. 430; 211–213), discussed in note 101, *infra*). The liberalizing promise of *Baker* v. *Carr* would not be permitted to reach full fruition. The ongoing reapportionment and redistricting at the local level taking place in many States would be cut short,[88] and a return to the patterns of the past might be expected even in those States in which the applicability of *Reynolds* at the local level of government is already, in many respects, a *fait accompli*. The sound and logical, and in some respects bold, decisions of various States and lower federal courts, which have not hesitated or deferred decision to await a definitive holding by this Court, would be undermined and rendered nugatory. State courts of last resort[89] which have progressively sought to apply the equal-population principle of *Reynolds* in a logical manner to local governmental bodies would, in a very literal sense, be left holding the bag.

An acceptance of the view that *Reynolds* logically applies at the local level leads to the conclusion, we submit, that districts established for the election of members of local governmental bodies must be judged by the same substantive standards as are laid down for State legislative districts in *Reynolds*, i.e.,

[88] For a discussion of such an ongoing development, involving ward redistricting in Philadelphia, see Note, *Legal Problems of Ward Realignment in Philadelphia*, 38 Temple L.Q. 174 (1965).

[89] See, *e.g.*, *State ex rel. Sonneborn* v. *Sylvester*, 132 N.W. 2d 249, 256 (Wis. Sup. Ct.); *Bailey* v. *Jones*, 139 N.W. 2d 385, 389 (S. Dak. Sup. Ct.); *Seaman* v. *Fedourich*, 209 N.E. 2d 778, 782 (N.Y. Ct. App.).

substantial equality of population. Some factual differences between the State and local bodies of course exist. On the local level virtually all bodies are unicameral in nature, while all but one of the 50 State legislatures is bicameral.[60] While the size of most local bodies is significantly smaller than most State legislative bodies, the constituencies on the local level would generally tend to be considerably smaller. A small numerical deviation from a population basis would thus tend to produce a larger percentage of disparity at the local than at the State level. And because the districts at the local level would tend to be considerably smaller than legislative districts in most States, both in terms of geography and population, more difficulty in following established political or natural or historical boundary lines might be presented in establishing equally populated, single-member districts at the local level. At all events, however, if the basic principle enunciated in *Reynolds*—that the weight of a person's vote cannot be made to depend on where he lives—applies to local governmental bodies, the same standard of equally populated districts would be a constitutional requisite. As under *Reynolds*, minor deviations to effectuate rational policy considerations would similarly be permissible.

Certainly there are a large number of these units of local government, and, in many respects, their nature, functions, powers and purposes differ (see the discussion, *supra*, pp. 16–21). As a logical starting point for constitutional analysis, however, we suggest

[60] This consideration, it would seem, would hardly run counter to the logic of applying *Reynolds* to local bodies, and might indeed tend to support such an application.

that the equal-population principle of *Reynolds* is applicable to all bodies of local government, representative in character, whose members are elected from districts (see *supra*, pp. 37–38). Subsequently, we discuss in more detail the particular bodies at issue in the instant cases (*infra*, pp. 72–101), in the context of a general consideration of the applicability of the basic constitutional principles to the various kinds of local governmental bodies. The conclusion as to the applicability of *Reynolds* could well rest solely on logic and consistent constitutional decision-making. In addition, however, we urge that sound considerations of policy (discussed *infra*, pp. 63–72) support the applicability of the equal-population principle, at least to all of the forms of local governmental bodies before the Court in the instant cases. Finally, despite the large number of these local bodies, we believe that the experience of recent years shows that the practical problem of judicial administration (see the discussion *infra*, pp. 107–118) is a wholly manageable one.

II. REASONS OF SOUND PUBLIC POLICY SUPPORT APPLICATION OF THE EQUAL-POPULATION PRINCIPLE TO LOCAL GOVERNMENTAL BODIES

A. LOCAL GOVERNMENTS PLAY VITAL ROLE

In *Reynolds* v. *Sims*, 377 U.S. at 564–565, this Court described the historical role of State legislatures in American political life:

> State legislatures are, historically, the fountainhead of representative government in this country. A number of them have their roots in colonial times, and substantially antedate the creation of our Nation and our Federal Government. In fact, the first formal stirrings

> of American political independence are to be found, in large part, in the views and actions of several of the colonial legislative bodies. With the birth of our National Government, and the adoption and ratification of the Federal Constitution, state legislatures retained a most important place in our Nation's governmental structure. * * *

Similarly, local governments have always been of critical importance in our democratic system. The town meeting in colonial New England is perhaps the earliest example of American government at the local level. In the early nineteenth century, De Tocqueville praised local self-government in the United States as follows:

> Local assemblies of citizens constitute the strength of free nations. Township meetings are to liberty what primary schools are to science; they bring it within the people's reach; they teach them how to use it and how to enjoy it. A nation may establish a system of free governments but without the spirit of municipal institutions, it cannot have the spirit of liberty.[21]

In similar vein, Lord Bryce, another leading analyst of American government, observed: "Democracy needs local self-government as its foundation."[22]

American local government is, of course, rarely based upon town meetings today. Instead, as we have seen, most local units are governed by a council or board or some other representative group, together with elected executives. Still, local government—government closest to the people—lies at the root of

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[21] De Tocqueville, Democracy in America, ch. 5, quoted in 1 McQuillin, Municipal Corporations, 330 (1949).

[22] Bryce, Modern Democracies, Vol. I, p. 320, quoted in 1 McQuillin, *supra*, at 331.

democratic institutions. The Kestenbaum Commission, appointed by the President in 1955, urged that it should be the basic premise of American government to "use the level of government closest to the community for all public functions it can handle," since "every citizen has the opportunity to participate actively and directly" only at "the lowest levels of government."[*] Citizens are able to participate more actively in local government because they are likely to have more familiarity with the issues and greater concern for the outcome. Local governments also offer the possibility of flexible solutions to specific local problems.

Viable government at all levels is the plainest requisite of our complex society. The growth of federal functions emphasizes, rather than lessens, our dependence on the effective exercise of governmental power at the State and local levels. Decentralized government is not a relic of the nineteenth century; it remains essential to the philosophy and practice of democracy. *Reynolds* and its implementation give promise of revitalization in our State capitols. Application of the equal-population principle will hopefully have a like effect in our city halls and county squares.

Local government is not merely important because it is closest to home; it also has great and growing practical effect on the daily lives of citizens. This is clear whether emphasis is placed on the increasing

[*] H.R. Doc. No. 198, 84th Cong., 1st Sess., 6, 47. Decentralized government not only maximizes citizen participation; when government operates effectively at the local level, public responsibility is accentuated, local officials are more responsive to community interests, and scrutiny of government action is enhanced.

number of subjects conferred to the jurisdiction of local units or on the rapidly rising amounts of money they collect, administer, and expend. For example, local governments—cities, counties, school districts, and the like—either alone or in conjunction with the States—have responsibility over law enforcement, the administration of justice, correctional institutions, public hospitals, welfare, public education, libraries, sanitation, fire protection, streets, local transportation, sewage, leasing and building codes, zoning, parks and recreation, and myriad other matters. These areas constitute the very marrow of community life—education for children, security for families, the physical make-up of the neighborhood, and necessary public services and utilities. At the same time, property taxes, still the principal source of funds for most local governments, are of great importance to homeowners, tenants, and businessmen. Decisions as to these local matters, which are so vital to daily living, may frequently be of greater immediate significance to citizens than determinations made in the State capital or in Washington.

Local governments are assuming increasingly greater importance, particularly in the 212 metropolitan areas where, as of 1960, 113 million Americans lived. In urban areas they tend to have greater freedom and authority because of home rule, and more and more people have been moving to these areas. At the same time, urbanization has greatly increased the pressures on local governments through rapidly accelerating demands for a wide variety of public services. Furthermore, the complexity of life

in densely populated urban areas has led to new and difficult problems, and to the development of new local governmental programs relating to slum clearance, urban renewal, public housing, welfare and poverty, public health, mass transportation, water and air pollution, juvenile delinquency, land-use planning, and the like. The federal government has been directing increasingly large amounts of funds to deal with these problems either through the States or directly to local governments. The ability to solve them, however, clearly depends on the vigor and effectiveness of government at the local level.

Another significant consideration involves annual expenditures. Government spending at the local level is substantial and is increasing rapidly.[64] In the fiscal year ending in 1964 city governments spent 18.9 billion dollars; county governments expended 8.9 billion dollars in 1962; and additional billions were spent by school and other special-purpose districts.[65] These figures have been rising at the rate of about eight percent a year, considerably faster than federal expenditures. In comparison, State governments had total expenditures of 42.6 billion dollars in fiscal 1964.[66]

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[64] During the ten-year period 1954–1964, total revenue for cities grew 97 percent, expenditures were up 96 percent, and total indebtedness was increased by 106 percent. For local governments other than cities, revenue increased 121 percent, expenditures 115 percent, and total indebtedness 129 percent. The Municipal Year Book 1966, 256.

[65] The Municipal Year Book 1966, 257; 1962 Census of Governments, Vol. IV, No. 2, "Finances of County Governments," 1.

[66] The Council of State Governments, The Book of the States, 1966–1967, 173.

While on the average expenditures by local governments are much smaller than those of State governments, this is not invariably so. New York City had expenditures of 3.2 billion dollars in the fiscal year ending June 1964. This is more than any State except California and New York. Another seven cities and one county had expenditures of over 200 million dollars, while seven States had expenditures below this amount.[47] Eight other cities and counties had expenditures of over 100 million dollars per year. Consideration of these financial figures alone indicates that local governments can hardly be characterized as insignificant parts of the governmental structure.

B. MALAPPORTIONMENT HAS DAMAGING EFFECTS UPON THE FUNCTIONING OF LOCAL GOVERNMENTAL BODIES

In *Reynolds*, 377 U.S. at 567, the Court pointedly stated:

> The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. * * *

Malapportionment at the local level almost invariably results in local bodies which are substantially less responsive to the more populous areas of the cities, counties, or special districts. Yet, these are the very areas where the problems are apt to be most acute.

[47] The Municipal Year Book 1966, 262-263; The Council of State Governments, The Book of the States, 1966-1967, 178-179; 1962 Census of Governments, Vol. IV, No. 2, "Finances of County Governments", 68-193 (Table 11).

The burgeoning suburbs have more serious educational, law-enforcement, planning, and other problems than nearby rural areas. Even more acutely, the deprived centers of our large cities are plagued by poverty, dilapidated housing, inadequate education, crime, congested traffic, and other problems which they are finding it increasingly difficult to solve. In addition, these areas are often heavily populated by minority groups which are subject to both poverty and discrimination.

It seems clear that, if local governments are to cope meaningfully with the grave problems of modern urban America, all citizens must be fairly and fully represented in the local governing bodies. Local governments are constantly forced to difficult choices: whether more funds should be spent in deprived areas than others; whether public housing should be built and where it should be located; what sort of urban renewal programs should be pursued; what kinds of new educational programs should be developed; and, critically, how additional funds to support various programs can be raised. If decisions such as these are to be made in the democratic tradition, they must be made by governing bodies which are truly representative, are sensitive to the needs of the affected community, and are committed to an unrelenting search for solutions. The needs are far too pressing to engage in the wasteful luxury of stalemate and ineffectiveness in local government. Regardless of the assistance provided by the federal and State governments, there is no doubt that the intractable problems of our

urban areas cry out for effective and concerted governmental activity at the local level.

C. NEWLY ENFRANCHISED VOTERS HAVE A GREAT INTEREST IN FAIRLY APPORTIONED LOCAL BODIES

In *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308, this Court observed that the Voting Rights Act of 1965 (42 U.S.C. 1973) "was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." Yet, the salutary goal of that legislation will not be fully realized if discrimination against minority groups can be perpetuated, albeit indirectly, by the maintenance of malapportioned local bodies. There is only scattered evidence that existing malapportionment at the local level is racially motivated. But little foresight is needed to predict that, if malapportionment at the local level is sanctioned by this Court as constitutionally permissible, pressure to adopt such schemes will mount.

During the first year and a half following the passage of the Voting Rights Act, approximately 459,000 Negro citizens were registered as voters for the first time in the five States which comprise the deep South.[68] For the first time in their lives these citizens are electing, or will soon be electing, representatives to serve them at all levels of government, including the local level. This massive registration effort could largely be undermined if the vote secured on the one hand could be grossly undervalued on the other.

[68] Alabama, Georgia, Louisiana, Mississippi, and South Carolina. Figures were compiled by the Department of Justice and the Civil Rights Commission.

Moreover, the intent of Congress could well be effectively frustrated, at least in part, if a pattern of malapportionment at the local level should eventuate. Although, in appropriate circumstances, racially based gerrymandering is subject to constitutional challenge, if districts at the local level could be grossly disproportionate in population, little need for such gerrymandering would exist in order to accomplish the same objective. Compare *Gomillion* v. *Lightfoot*, 364 U.S. 339, with *Wright* v. *Rockefeller*, 376 U.S. 52.

Effective involvement in government at the local level may be far more meaningful for newly enfranchised voters than the right to vote for legislators in a population-based State legislature. The most urgent needs of these citizens and their most pressing interests will often relate to matters within the purview of local officials. County and city governments and, perhaps most importantly, school boards have competence and control over those specific, everyday matters and programs in regard to which progress toward equality in rights and opportunity can be most expeditiously and effectively advanced. Matters such as public housing, building codes, sanitation, public transportation, health services all touch the daily lives of these citizens most directly, and all are largely administered at the local governmental level.

Moreover, constituencies at the local level are relatively small, and the representative-voter relationship thus tends to be far more direct. While the voices of minority group representatives at the national and State level might be somewhat muted by those of the majority, local governing bodies, importantly depend-

ent on these voters for election and reelection, might be expected to be more responsive to minority groups and more concerned with their detailed, day-to-day problems. To rely only on properly apportioned State legislatures and the federal government to meet the needs and promote the welfare of these citizens is to engage in wishful thinking and invite years of delay, dissatisfaction and frustration. These new voters deserve the rights as well as the responsibilities of full citizenship at all levels of government. Malapportionment at the local level, if its perpetuation is long countenanced, will seriously inhibit, for "millions of non-white Americans," that participation "on an equal basis in the government under which they live" so proudly promised by the Voting Rights Act of 1965."

III. THE EQUAL-POPULATION PRINCIPLE APPLIES TO EACH OF THE SEVERAL KINDS OF LOCAL GOVERNMENTAL BODIES HERE INVOLVED

We have discussed the general considerations of principle, logic and policy which support the applicability of *Reynolds* to local governmental bodies. We now turn, more specifically, to the particular kinds of governmental bodies involved in the instant cases, using them as prototypes in discussing the potential scope of the equal-population principle and whether any distinctions should be made, in regard to its applicability, among the various types of governmental bodies operating on the local level.

" *South Carolina* v. *Katzenbach*, 383 U.S. 301, 337.

A. GOVERNING BOARDS OF COUNTIES AND MUNICIPALITIES WHICH ARE ELECTED FROM DISTRICTS ARE SUBJECT TO REYNOLDS' EQUAL-POPULATION REQUIREMENT

In *Reynolds*, this Court characterized State legislatures as "instruments of government elected directly by and directly representative of the people" (377 U.S. at 562) which are "responsible for enacting laws by which all citizens are to be governed" (*id.* at 565). This characterization is equally applicable to the governing bodies of counties and municipalities.[10] Indeed, these "little legislatures" do not differ in any relevant respect from State legislatures. They are ordinarily empowered to enact ordinances of general applicability and perform functions affecting all local residents. Moreover, these bodies are almost invariably governed by elected representatives who, it is contemplated, will be responsible and responsive to the voters. Thus, the same "personal" and "basic" right involved in voting for representatives in a State legislature (*id.* at 561) is exercised in electing members of a city council or county board.

That such local governmental bodies generally derive their legal existence from the State legislature and exercise delegated, rather than inherent, powers does not impair the analogy.[11] That fact is relevant only to the extent that it demonstrates the State's

[10] Although the discussion herein refers only to county and city governing boards, since these are the kinds of bodies involved in the instant cases, many of the same considerations apply to township boards as well, especially where such bodies exercise general governmental powers. See the discussion *supra*, pp. 16–19.

[11] See the discussion in note 43, *supra*.

involvement in, and responsibility for, malapportionment at the local level. Of course a State might determine that members of county boards and city councils will be appointed by the Governor or the State legislature. We do not contend that the States must establish any particular form of local government, or that citizens have a federal constitutional right to elect county supervisors or city councilmen. But such units are found in and throughout every State, and the States have almost uniformly determined that they will be governed by elected representatives. Having so decided, they may not confer the privilege of voting for these representatives in a manner which dilutes the weight or debases the effect of some citizens' votes because of where they happen to reside within the political subdivision.

It is no answer to say that State legislatures, properly apportioned under the mandate of *Reynolds*, will provide an adequate remedy for malapportionment at the local level, and that the courts, including this Court, should leave the matter wholly to the political process. Most courts, as we have seen, have disagreed with such an approach, except as a temporary matter. And, although the States have ultimate authority over the apportionment and districting of governmental units, the actual role played by the legislatures in drawing district lines varies considerably. The Alabama legislature designed the districts for the Houston County Board of Revenue and Control, the Virginia General Assembly adopted the districts approved in a popular referendum in Virginia Beach, and the Texas legislature played no part at all in determining the districts for the election of Midland

County commissioners.[72] Moreover, even assuming a new breed of legislators with a philosophical commitment to reapportionment, there is no reason to believe they will have any greater political stake in, or any more eagerness for, proper apportionment of local governmental bodies.[73] And even if the legislator representing a particular locale wishes to have the county board redistricted through the enactment of local legislation, the matter remains primarily one of limited concern and he may be unable to persuade a sufficient number of other legislators to effectuate his proposal. If the matter is ordinarily handled through general legislation having statewide effect, the legislator's problem would probably be further compounded and even more difficult. At all events, the important constitutional right involved should not be left to the

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[72] Involved in *Avery* v. *Midland County*, pending on petition for certiorari, No. 958, this Term (see 406 S.W. 2d 422).

[73] Indeed, it has been argued that reapportionment of the State legislatures, by giving greater political power to urban areas, may intensify resistance to local reform. See Note, Reapportionment, 79 Harv. L. Rev. 1228, 1273 (1966). On the other hand, at least several State legislatures, *viz.*, Wisconsin, Michigan and New York, and perhaps a few more, have taken action to correct malapportionment of local bodies, and bills to this end are presently pending in a few more States. See Wis. Sess. Laws, 1965, Ch. 20, § 7, amending Wis. Stat. Ann. § 59.03; Mich. Stat Ann. §§ 5.369(1)–(15); see also R. 491; 175–184, relating to a New York enactment vetoed by the Governor. Where the underrepresented voters are in a minority—a problem no less serious than the underrepresentation of a majority—legislative correction of local malapportionment seems less likely. And State legislators will often represent districts in which some citizens are overrepresented and some underrepresented in their local bodies, and will wish to avoid the matter if possible.

vagaries of the political process, at least not without a clear statement of the constitutional prerequisites and the prodding of a prompt judicial remedy. As this Court said in *Lucas* (377 U.S. at 736):

> Except as an interim remedial procedure justifying a court in staying its hand temporarily, we find no significance in the fact that a non-judicial, political remedy may be available for the effectuation of asserted rights to equal representation in a state legislature. * * *

As discussed earlier, the method of electing city councils and, occasionally, county boards is generally determined by a charter adopted by the electorate, and subject to amendment by the electorate. And, at least in some States, initiative and referendum procedures exist at the local as well as the State level. But the fact that the voters have themselves designed or acquiesced in the existing apportionment, and have a means available to effect a change, does not make judicial action inappropriate. Once again, *Lucas* settles that question (*ibid.*):

> Manifestly, the fact that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act. As stated by this Court in *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638, "One's right to life, liberty, and property * * * and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.

Counties and cities, while not the most numerous, are probably the most familiar kind of local govern-

ment. They are general-function units exercising important and substantial governmental powers which touch each citizen's ordinary and everyday affairs. There can be no serious doubt about the applicability of the equal-population principle of *Reynolds* to the governing boards of these basic units of government. Three of the instant cases are illustrative in this regard.

1. *No. 491.* In our view, this case presents the strongest possible situation for application of the equal-population principle. The Board of Supervisors of Suffolk County is the legislative and policy-determining body of the county. When this litigation was commenced, its members were elected from districts having a maximum population-variance ratio of 132 to 1. Noting that the action attacked "the provision of the Suffolk County Charter whereby the County Board of Supervisors, which has a local legislative authority, is to consist of the elected Supervisors of each of the county's ten towns," the court below stated (R. 491; 125–126):

> The basic theory of the action is disparity of representation. Concerning disparity, there can be no question. The ten towns of Suffolk were never of equal population; town lines were not drawn on a population basis and did not profess to be so drawn. In addition, over the years radical population changes as a result of economic and industrial developments have taken place in eastern Long Island. * * * The eastern area remains thinly populated; the western has become rather densely populated. Thus, for example, the town of Shelter Island finds itself about as it was 150 years ago

> with its population stabilized at some 1,300 persons, whereas the towns of Islip, Huntington and Babylon, to take extreme cases, have some 172,000, 126,000 and 142,000 persons, respectively.
>
> Each town has elected its chief executive officer (the supervisor) and no fault can be found with this practice. The trouble arises, so aver the plaintiffs, because the supervisors of the ten towns constitute the Board of Supervisors of the County which is the legislative body of the County. * * *

As further noted by the court below (R. 491; 136 n. 6): "The five least populous towns having approximately 10% of the county's population have five supervisors with voting strength equal to the five supervisors representing the remaining 90%."

The district court found that the apportionment scheme in Suffolk County resulted in invidious discrimination. After allowing ample time for political or legislative relief, the court ordered the Board to adopt and submit to the electorate a new plan of government with a properly apportioned governing board. That decision, in our view, was clearly correct, and, assuming that a three-judge court was properly convened, should be affirmed.[74]

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[74] That Suffolk County voters approved the charter containing the challenged apportionment plan is without constitutional significance, under *Lucas*, 377 U.S. at 731–732; 736–737. Nor is the long history of Suffolk County and its towns a justification for the existing plan, under *Reynolds*, 377 U.S. at 579–580. We express no view on the lower court's holding the Suffolk County apportionment invalid under the New York as well as the federal Constitution (see R. 491; 199). We discuss the possible jurisdictional problem in this case at pp. 126–128, *infra*.

Two somewhat ancillary issues involved in this case deserve mention. One arises from the fact that the supervisors are members of the Board by reason of their election as the chief executive officers of the towns within the county. This circumstance does not weaken the case, in our view, because Board membership is not only a very important responsibility in itself, but is undoubtedly more important than the functions performed as town executive. The right to an equally weighted vote in electing local governmental bodies cannot be subverted through the use of *ex-officio* representation or by combining the representative function with other duties of greater or lesser importance.

Another issue relates to the use of weighted voting as a remedial device in apportionment cases, the district court having ordered a weighted voting system adopted as an interim measure, pending a permanent legislative remedy (see R. 491; 199). Recognizing the difficulty in having a reapportionment plan drawn by a malapportioned board, yet reluctant to allow further delay, the court sought a plan which would provide a prompt, yet fair, remedy.[15] In this respect, despite having some reservations about weighted voting as a permanent solution, the court below followed the example of the New York State courts in other cases involving local governmental units.[16] But it

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[15] Under the court's ordered plan, each member of the Board is given the number of votes equal to the quotient of the population of his town divided by 5,000, to the nearest whole number, but no supervisor would have less than one vote (R. 491; 199).

[16] Citing *Seaman* v. *Fedourich*, 262 N.Y.S. 2d 591 (Sup. Ct., Broome Co.), and *Shilbury* v. *Board of Supervisors*, 260 N.Y.S.

did not simply order a weighted voting plan into temporary effect; the court also directed the Board to develop a plan or plans for its consideration and for eventual submission to the county electorate. And later, when various plans had been submitted, the court expressly noted that one of the proffered plans "is defective in that it provides for straight weighted voting by the Supervisors of the Board as presently constituted" (J.S. 491; 15a). No specific plan was ordered into effect or even approved by the court. Rather, the court simply directed the board to submit to the electorate in November 1966 a charter amendment composed of various proposed, constitutionally valid plans for permanent apportionment of the county board (R. 491; 199).

In these circumstances, it does not appear that the question of the propriety of a weighted voting scheme as a permanent measure is properly raised here, and a discussion of that question does not seem warranted. On the other hand, the adoption of a weighted voting scheme as a "stopgap" measure, for use until a new permanent plan is devised, approved, and put into effect, seems plainly proper as an appropriate temporary remedial technique which a court in its discretion might utilize (see *Reynolds*, 377 U.S. at 585). When used in this fashion, weighted voting provides a reasonable alternative to either allowing the existing malapportionment to be perpetuated for a considerable period of time or taking the fashioning of a permanent apportionment plan out of the hands of the people and their elected representatives.

2d 931 (Sup. Ct., Sullivan Co.). See also *Graham* v. *Board of Supervisors*, 273 N.Y.S. 2d 419, 421 (Ct. App.), approving a weighted voting plan "solely as a temporary expedient."

2. *No. 624.* This is a rather straightforward case without a complicated election scheme. Five of the six members of the Board of Revenue and Control of Houston County, Alabama, are elected from districts by the electors in each of five prescribed districts. Sixty-one percent of the population and sixty-nine percent of the total assessed value of property are located in one district, and the maximum population-variance ratio is approximately 6 to 1.

Appellees assert that the Board possesses only minimal powers and is concerned primarily with the rural area of the county lying outside the most populous district. The first point is adequately refuted by a mere recitation of the Board's authority, which extends over highways, public health and welfare, sanitation, hospitals, waterworks, and all county property, and includes the power to tax, condemn property and issue revenue bonds."[11] The second point is

[11] Some of the opinions in the cases heretofore considered (*supra*, pp. 44–55) contain an enlightening discussion of the powers and functions of the respective county governing boards there involved. See, *e.g.*, *State ex rel. Sonneborn* v. *Sylvester*, 132 N.W. 2d 249, 256 (Wis. Sup. Ct.), noting that the State legislature "has granted a substantial bundle of legislative powers to county boards and may grant additional substantial powers," and that "the county today is a unit of government with vital powers over the lives of its residents"; *Bailey* v. *Jones*, 139 N.W. 2d 385, 388 (S. Dak. Sup. Ct.), stating that among the powers of county boards "are the authority to enact rural and airport zoning regulations; construct and repair bridges and highways; designate through or main highways and the speed thereon; establish and maintain public parks, county fairs, and free libraries; contribute to health centers; provide for assistance [sic] and deputies in county offices; generally supervise the fiscal affairs and levy taxes on all property in the county. * * * In effect they both manage and govern the counties"; *Hanlon* v. *Towey*, 142 N.W. 2d 741, 747 (Minn. Sup. Ct.), noting that "the county board's power with respect to taxation,

also without merit. As stated by this Court in *Reynolds*, "people, not land or trees or pastures, vote" (377 U.S. at 580). It is equally true that people, not land, use highways, libraries, and hospitals. People, not trees, require public welfare and sanitation facilities, and people, not pastures, pay taxes. The services performed by the Board are, under the legislation establishing its authority, intended for the benefit of all residents of the county. Certainly, taxes which support such services are paid by all county residents without regard to the district of residence. Yet, only five percent of the county's expenditures for the construction and maintenance of public roads was inside the city limits of Dothan (R. 624; 91, 119). Malapportionment of the county board cannot be justified on the ground that overlapping or

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the county budget, capital improvements, welfare, health, the administration of justice, zoning, and many other areas of public service is quite different in variety and scope than that possessed by an administrative or special-purpose unit of government"; *Martinolich* v. *Dean*, 256 F. Supp. 612, 615 (S.D. Miss.), stating that county boards have "been invested with vast authority and responsibility by the legislature. * * * They have legislative, executive and quasi-judicial powers, duties and responsibilities. They have full jurisdiction over roads, bridges and ferries. They equalize ad valorem assessments for taxes for the whole county and fix the tax levies for the county, for supervisors districts and for county schools. They may acquire lands by purchase or by eminent domain for county purposes and may sell county property. They authorize and approve expenditures of public funds for a long catalogue of governmental purposes. They issue bonds for the county * * *. They, in effect, are purchasing agents for the county and many of its offices and agencies. They have zoning responsibilities, promotional authority, and subsidizing powers for certain activities and undertakings. They can issue subpoenas and punish for contempt. * * * In short, they are, to a large extent, the government of their county."

additional services are provided by the city—paid for, of course, by the residents of Dothan." There is, of course, no constitutional prohibition on a governmental unit being organized with sole responsibility and taxing authority outside the city limits of Dothan. But, so long as the Board exercises general authority over the whole county, and taxes accordingly, there is no justification for deviation from population-based districting.

A majority of the district court panel, alluding to the absence of any definitive decision of this Court, denied the relief sought on the grounds that (1) mere numerical imbalance in an apportionment scheme "falls short of proving invidious discrimination" and does not warrant judicial intervention (R. 624; 61); (2) Dothan residents "have a clearly available political remedy," and the question of redistricting may "safely be committed" to a properly apportioned State legislature (R. 624; 62); and (3) the Board is a non-sovereign political subdivision of limited powers and does not exercise clearly "legislative" functions to the extent necessary to invoke the equal-population principle (R. 624; 63).

Both of the latter points—the adequacy of the political remedy and the scope of the Board's powers—have been discussed previously (*supra*, pp. 74–77 and pp. 81–83)." The first point is refuted by this

" See, however, *Hanlon* v. *Towey*, 142 N.W. 2d 741, 747 (Minn. Sup. Ct.), and Note, 11 S. Dak. L. Rev. 386, 395 (1966).

" Contrary to the lower court's suggestion, the application of the equal-population principle cannot, in our view, be made to turn on whether the governing body's functions are labelled "legislative", "administrative", "executive" or some combination of such terms. Neither the right to cast an equally

Court's decision in the *Lucas* case, a companion to *Reynolds*. Indeed, there the Court found Colorado's legislative apportionment constitutionally deficient on a more slender record (377 U.S. at 734–735). In *Lucas*, unlike here, there had been no long-continued failure to reapportion—the apportionment invalidated had been adopted in November 1962. Nor was there, as here, an allegation of whimsical, or purposeful, discrimination; and in *Lucas* the Court rejected the argument that the availability of a political remedy (there, initiative and referendum) justified anything more than a temporary staying of relief (*id.* at 736–737). Thus, in our view, the court below erred in upholding the existing districting arrangement and, assuming that a three-judge court was properly convened, its decision should be reversed.[80] As Judge Johnson stated in dissent, the court below should at least have retained jurisdiction and stayed proceedings "to allow the State a reasonable time to adopt a valid scheme of reapportionment" (R. 624; 71).[81]

3. *No. 724.* Most of the issues raised in this case have been dealt with previously, although, unlike Nos. 491 and 624, which involve county boards, at issue

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weighted vote nor the importance of the particular local governmental body involved depends on such labels. Some of the offices involved in *Gray* v. *Sanders*, 372 U.S. 368, we note, were State "executive" offices. Limiting the equal-population principle to bodies exercising "legislative" authority has some superficial appeal, but disregards the right to cast an equally weighted vote for members of other kinds of bodies elected from districts. In this regard, see the concurring opinion in the *Strickland* case (256 F. Supp. at 886).

[80] We discuss the possible jurisdictional problem in this case at p. 128, *infra*.

[81] As to Judge Johnson's views on the applicability of *Reynolds*, see note 55, *supra*.

here is the districting scheme for the election of the city council of recently expanded Virginia Beach, Virginia.[32] The only novelty stems from the use of so-called "7–4 plan," under which each of seven members of the council must reside in and declare his candidacy from one of the seven boroughs in the city, while no residence requirements relate to the other four seats.[33] The maximum population-variance ratio among these boroughs is 39.8 to 1.

An argument is made that, since all eleven members are elected at large by all voters of the city, no member should be considered to be a representative of any particular area. However, the rationale for the 7–4 plan, and the use of disproportionately populated boroughs, was to insure representation for the rural interests in the less populous boroughs.

[32] Most city councils have essentially all of the substantive powers commonly possessed by county boards, and, indeed, significantly more authority in some instances, particularly where home-rule municipalities are concerned. Some of the cases discussed previously involved city councils instead of county governing boards, and no significant distinctions have been drawn between the two kinds of bodies insofar as the applicability of the equal-population principle is concerned. Indeed, while much of the litigation in New York has involved county boards (see note 48, *supra*), the basic court of appeals decision, *Seaman* v. *Fedourich*, 209 N.E. 2d 778, was in a case challenging the composition of a city council. Similarly, the Fourth Circuit's early and leading decision in the *Ellis* case (352 F. 2d 123) involved the Baltimore City Council.

[33] Although an argument is made that, by failing to appeal from an earlier order, appellants conceded the applicability of the equal-population principle, and that the only question here raised is whether the particular plan at issue comports with the constitutional requirement, we take no position on that question and assume *arguendo* that the threshold question of applicability is presented here as in the other three cases. In regard to the jurisdictional question presented by this case, see the discussion *infra*, pp. 125–126.

Indeed, there can be no other sensible explanation of the scheme.

We do not suggest that a scheme of at-large elections with district residence requirements is, *ipso facto*, unconstitutional.[84] Our submission is, rather, that when the prescribed residence districts are of disparate population, voters residing in the more populous districts suffer a qualitative impairment of their vote of the same stature and constitutional significance as the quantitative impairment suffered by voters in *Reynolds* and the companion cases. The freedom of choice of electors in the more populous districts is substantially curtailed vis-à-vis the choice of electors in the sparsely populated districts—their right to vote is simply not the same right as that accorded to those living in the less populous areas. Certainly no individual is entitled to have whomever he personally selects as the representative for his district; nevertheless, he is entitled to the same breadth of choice in casting his vote that is available to other electors voting in the same political unit. While the weight of all votes cast in electing councilmen is literally the same,[85] the character and effect of the votes vary

[84] See, *e.g.*, *Reed* v. *Mann*, 237 F. Supp. 22 (N.D. Ga.), holding that such a scheme, without more being shown, is not *per se* invalid.

[85] Of course, the choice of a majority of the voters in a particular residence district may be overriden by the voters generally. But the choice of the voter in a more populous district, as to certain of the seats to be filled, is limited to candidates required to reside in a less populous district. Despite the at-large feature, those residing in such a favored district are in effect accorded separate representation above and beyond that to which their number would entitle them. It is simply "ignor-

according as the elector resides in a heavily or sparsely populated residence district. Simply stated, under such a scheme voters are treated differently on the basis of where, within the city, they happen to reside. That, under *Reynolds*, is impermissible.

This Court's decision in *Fortson* v. *Dorsey*, 379 U.S. 433, does not command otherwise.[24] No question was raised or discussed there regarding disparity among the populations of the several residence districts. Indeed, as appears from Mr. Justice Douglas' dissent, the districts were quite close in population, the maximum population-variance ratio among the

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[ing] the practical realities of representation" to say that all councilmen represent all voters in the city, and that the at-large feature saves the scheme (*Fortson* v. *Dorsey*, 379 U.S. 433, 437–438).

[24] In *Fortson* the question before the Court was simply whether the creation of multi-member districts for the election of legislators was *per se* unconstitutional, as the lower court had held (228 F. Supp. 259). Noting that in *Reynolds* the Court had "rejected the notion that equal protection necessarily requires the formation of single-member districts" (379 U.S. at 436), the Court concluded that county-wide voting in several multi-district counties did not deny residents of those counties a vote equally weighted with that of residents in single-member constituencies (*id.* at 437). Continuing, the Court carefully narrowed its holding (*id.* at 439): "* * * [O]ur opinion is not to be understood to say that in all instances or under all circumstances such a system as Georgia has will comport with the dictates of the Equal Protection Clause. It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster. This question, however, is not presented by the record before us. * * *"

Fulton County districts being 1.1 to 1." Moreover, in *Burns* v. *Richardson*, 384 U.S. 73, this Court indicated that inquiry into the manner in which residence requirements were established and the way in which residence districts were drawn was necessary before such a scheme could be approved. The Court there stated that an invidious effect may be shown "if, in contrast to the facts in *Fortson*, * * * districts are not appropriately subdistricted to assure distribution of legislators that are resident over the entire

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379 U.S. 433, 441. See the opinion by Circuit Judge Haynsworth in which such equality was thought to be crucial in *Fortson*. *O'Shields* v. *McNair*, 254 F. Supp. 708, 714 (D. S.C.). See also *Montgomery County Council* v. *Garrott*, 222 A. 2d 164, where the Maryland Court of Appeals held that a scheme involving an at-large election of all members of a county governing board, where five of the seven members were required to reside in districts grossly unequal in population, was unconstitutional. There one of the residence districts contained 54 percent of the county's population, while two of the others contained only three and four percent, respectively. While placing considerable reliance on the Fourth Circuit's decision in the instant case, the Maryland court stated (222 A. 2d at 166): "That a requirement of residence by a legislative representative in a district malapportioned as to population is unconstitutional, even though election be by all the voters of the political subdivision of which the district is a part, was foreshadowed by *Fortson* v. *Dorsey*, 379 U.S. 433 * * *." *Fortson* was decided, in the view of the Maryland court, "on the premise that the [residence] districts were equal in population" (222 A. 2d at 166). With that view of *Fortson* we completely agree. See also *Gray* v. *Board of Supervisors*, 222 A. 2d 176, 178 (Md. Ct. App.), and the opinion of the lower court in No. 491, rejecting the so-called Albertson plan under which each of the ~~two~~ Suffolk County towns would be represented by one supervisor, but all supervisors would be elected by county-wide balloting, stating that this scheme "would appear not to rectify but to perpetuate the malapportionment that now exists" (R. 491; 193). Compare, however, that court's later statement that such a scheme was "probably, if marginally, constitutional" (J.S. 491; 16a).

district * * *" (384 U.S. at 88). If the geographical distribution is critical, and may be appropriately inquired into, then surely *Fortson* does not foreclose a holding that the 7–4 plan is invidiously discriminatory in regard to those residing in the more populous residence districts.[38]

The district court in the instant case was clearly troubled by the disparities in population but found that the plan was justifiable as an interim measure for the period of "transition".[39] The plan was defended before that court on the ground that it allowed for growth and changes in population (R. 724; 97, 103–104). Yet, the court of appeals found that growth in the immediate future would almost certainly occur

[38] That the problem here at issue is not so narrow a one as it might initially appear to be is indicated by figures (see note 24, *supra*) showing that a large number of county boards are elected under schemes providing for at-large elections but with residence district requirements. A number of members of city councils and other local governmental bodies are similarly elected (see note 26, *supra*). And *Martinolich* v. *Dean*, 256 F. Supp. 612, 616 (S.D. Miss.), shows that a pattern of shifting to at-large elections while retaining the previously existing districts simply as residence districts, though unequal in population, might develop. In that case the court specifically noted that it was not passing on the validity of such an arrangement.

[39] The illustration given in footnote 2 to Judge Hoffman's opinion (R. 724; 111), despite its superficial plausibility, clearly fails to justify the plan. If the candidate from Pungo is the most qualified and popular candidate under this scheme it may fairly be assumed that he will be under a proper one. On the other hand, his large vote may be due to extraneous factors (note that nine other candidates ran unopposed). Moreover, that a candidate who lost in his home district won at large may merely indicate that he was the lesser of two evils. It does not imply that he would have beaten a different potential candidate drawn from anywhere in the unit or from a residence district equal in population to all other such districts.

in those districts which are already more heavily populated (R. 724; 118). In fact, estimated population figures for 1964 show that the urban areas grew by a greater percentage (R. 724; 109), and that the maximum population-variance ratio increased from 39.8 to 1 in 1960 to an estimated 42.8 to 1 in 1964 (R. 724; 80). The difficulties stemming from the consolidation and transition of Virginia Beach's governmental structure can be adequately met in ways which do not impair the right to vote. For example, special taxing districts were formed as part of the city charter to pay for indebtedness incurred and benefits conferred by the component governments before consolidation. Maintaining of compact constituencies was also cited as a rationalization for the 7–4 plan as drawn, but if this factor does not justify disparities in the districts from which State legislators are chosen,[30] then it seems inconceivable that it could justify the disparities here.

[30] See the dissenting opinion of Mr. Justice Stewart in *Lucas*, 377 U.S. at 756–757. See also the opinion of the Fourth Circuit in the instant case, which noted (R. 724; 121–122): "Moreover, confessedly, the Virginia Beach plan was purposed, and drafted with an eye, to include in the makeup of the council the representation of the peculiar interests of each borough. It was architectured to give voice to the agricultural or non-urban concerns of the smaller boroughs. However understandable, reasons of this kind may not be counted in appraising the Constitutionality of an apportionment," citing *Reynolds*, 377 U.S. at 562. See also *Davis* v. *Mann*, 377 U.S. 678, 692.

Most of the State legislative cases were viewed as involving underrepresentation of urban and suburban areas and overrepresentation of rural areas. A similar situation is presented in all of the instant cases, even No. 724, although a city council is involved. However, such an urban/rural dichotomy will not be presented in at least a number of local government apportionment controversies, such as, for example, most of those relating to city councils, since the area involved (unlike Virginia Beach) will generally be completely urban in character.

The court of appeals found that the 7–4 plan violated the Equal Protection Clause and ordered the district court to retain jurisdiction pending legislative action. In rejecting the argument that, despite the disparate populations of the various residence districts, the at-large aspect of the plan saved it from constitutional attack, the Fourth Circuit noted that full compliance with the Fourteenth Amendment was wanting because, under the 7–4 plan, "the imbalance in representation in the council is obvious" (R. 724; 119). That court pointed out that the smallest borough, or residence district, was accorded the "same assured representation" as the largest borough in the city. In distinguishing *Fortson* the Fourth Circuit stated that in that case the Court "explicitly noted the absence of any substantial inequality among the [residence] districts" (R. 724; 121). Concluding that "it is not readily conceivable that the Court would have given its endorsement" to a scheme involving such "a vast disparity" between the populations of residence districts as is here presented, the Fourth Circuit observed (R. 724; 121):

> Altogether unrealistic is the assumption that the member from the smaller populated political subdivision would give, or could humanly be expected to give, the far greater populated subdivisions representation equal to that he accords his residence constituency. Nor would his naturally dominating provincial interest be neutralized by his dependence upon the electorate of the entire city for his office. His subsequent defeat, because of a show of parochialism, would not remove the inequality in repre-

> sentation, for the choice of a successor would still be limited to the same district. The smaller area of population would thus continue to have representation equivalent to the much larger districts. This curtailment upon the selectivity of potential candidates is further proof of the vulnerability of the plan. * * *

If a State were to provide for the election of State legislators at large, but establish residence districts unequal in population, it is impossible to conceive of this Court's upholding such a scheme under *Reynolds, Lucas, Fortson,* and related cases. No difference in result should occur because such a system is established at the local rather than the State level. *Reynolds'* equal-population principle may not be so readily subverted. In our view, the decision of the court of appeals was correct and should be affirmed.

B. SCHOOL BOARDS WHICH ARE ELECTED FROM DISTRICTS ARE LIKEWISE GOVERNED BY THE EQUAL-POPULATION PRINCIPLE OF REYNOLDS

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, * * * [and] is the very foundation of good citizenship."[21] * * *

Those words are no less true today than they were in May 1954. Education unquestionably plays a

[21] *Brown* v. *Board of Education,* 347 U.S. 483, 493.

critical role in our lives and remains a matter of foremost concern of government and the citizenry. To be sure, education is rarely a purely local responsibility. Yet no one will gainsay that local units commonly exercise considerable autonomy and a vital discretion in this area.

Nor is the public interest and controversy with respect to education by any means limited to the problem of racial segregation.[a] Education is the concern of all citizens, whether or not they have children of school age, and it may well arouse more general interest than any other governmental function. School boards are by far the most numerous and common of the various types of local governmental bodies, and their pervasive effect in the community is directly felt by all.

In addition to performing a critical function, school boards often operate rather independently of State or local control, and exercise substantial powers which not only affect school children, through their authority over facilities, personnel, books and curricula, but also affect all citizens, through the power to tax and to take property under eminent domain, and the authority to fix budgets and to administer federal assistance programs. The overwhelming majority of school boards are elected, which indicates a wide preference for direct participation by the citizen in the

[a] There is no blinking the fact, however, that malapportioned school boards which do not include minority group representation at least roughly equivalent to population could be expected to have more difficulty in dealing with racial problems in the educational system, and would probably be less attuned to minority group needs in regard to education.

shaping of educational policies. Moreover, because school boards are generally single-function governmental units, a desire that issues regarding education be isolated from other issues of governmental concern and that specific viewpoints on education be expressed in the elective process seems plainly indicated. In these circumstances, the right to vote for school board members must be vigorously protected against undervaluation. It is of no less, and indeed may be of more, importance than the right to vote for other sorts of representatives. Indeed, such has been the ruling of the other lower federal courts which have definitively passed on the question of the applicability of the equal-population principle to school boards. *Delozier* v. *Tyrone Area School Board*, 247 F. Supp. 30 (W.D. Pa.); *Strickland* v. *Burns*, 256 F. Supp. 824 (M.D. Tenn.) (see the discussion *supra*, pp. 51–52, 54–55).[33]

No. 430. The Kent County School Board has authority to appoint a county superintendent, prepare a budget and levy taxes, recommend library books, conduct special programs and transfer areas between school districts (see R. 430; 143–148). Plainly the Board exercises influential control over educational policies and practices in Kent County, Michigan.[34]

[33] Another case involving a challenge to a school board districting scheme was decided without reaching the question of the applicability of the equal-population principle. *Detroit Edison Co.* v. *East China Township School District No. 5*, 247 F. Supp. 296 (E.D. Mich.). Cf. *Pitts* v. *Kunsman*, 251 F. Supp. 962, 964–966 (E.D. Pa.); *Elberti* v. *Kunsman*, 254 F. Supp. 870 (E.D. Pa.).

[34] County school boards in Michigan are not treated as independent governments by the Bureau of the Census. 1962 Census

Yet, a majority of the three-judge panel concluded that the equal-population principle was inapposite."

Most of the considerations involved in determining the applicability of the equal-population principle of *Reynolds* at the local level have already been discussed. Those considerations are, in our view, equally applicable to elected school boards. The problem remaining in the instant case arises from the two-step

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of Governments, 304. Apparently, the reason is that they do not have final approval over the maximum amount of their budgets (see Mich. Stat. Ann. § 15.3298(1)(c) and 1962 Census of Governments, 15–16). However, the budget is approved by an elected assembly organized just like other local governments, and that assembly elects the Board. Since the attack here is not solely against the composition of the Board, but against the whole election scheme, including the assembly, our position in this case is not inconsistent with our adoption of the definitions and terminology of the Bureau of the Census (see *supra*, pp. 14–15).

" In denying relief the court below did not rely on the fact that the case involves a school board, but rather indicated a reluctance to apply the *Reynolds* doctrine to local governments in general. Not only did the majority state that "[t]he facts and issues in connection with this case are very ably set forth in the opinion of Judge Fox" (R. 430; 220), but they also indicated broadly that they "do not agree that the decisions to which reference is * * * made require the District Courts of the United States to review the manner of apportionment and constitution of each and every board and agency of the several states * * *" (R. 430; 221). Inquiry into whether the particular election scheme involved in this case is one as to which the equal-population principle applies, even if applicable as a general matter to local governmental bodies, including school boards, is of course not foreclosed by the lower court's view that that broad question was raised. But the majority's position does indicate that they perceived the broad question to be presented, and did not decide the case on the somewhat narrower ground.

election system which is used in selecting the County School Board, and is unrelated to the fact that the unit involved is a school board."[6]

Members of the Board are not elected from districts. Consequently, there can be no attack on the apportionment of the Board itself. Rather, the constitutional objection, properly considered, is focused specifically on the apportionment of the assembly which elects the Board. That assembly is composed of one representative from each of the 39 boards of education for the various local school districts within the county. Each has one vote, irrespective of the number of people represented, in electing the five Board members. The maximum population-variance ratio among these school districts is about 2038 to 1.

Unfortunately, there was little helpful discussion in the opinions of the lower court directed to the problems raised by this scheme.[7] It would appear that

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[6] No view is here expressed on the question as to standing asserted by some of the parties. We assume *arguendo* that at least some of those on each side of the litigation are proper parties. In addition, we do not discuss any questions relating to the annexation and detachment of certain areas, as between various school districts, nor whether the particular transfer of territory, which initially gave rise to this litigation, should be upheld on the ground that the approval of the Board, though malapportioned, was the action of a *de facto body*. It would appear that such questions lack federal constitutional significance and, we note, the question as presented in the Jurisdictional Statement filed in this case relates only to the applicability of the Equal Protection Clause to the election system here involved.

[7] Judge Fox, in dissenting, characterized the scheme as "essentially a unit system of voting—each school district within the county receives one vote in the election of each of the five members of the county board" (R. 430; 200). In his view, the system was one "paralleling the 'county-unit' system in-

the argument against the applicability of *Reynolds* is one grounded principally on the asserted absence of a State-conferred right to vote for County School Board members. Another formulation might be that the Board is not intended to be responsive to, or representative of, the general citizenry, but rather to have such a relationship only as to the constituent boards of education, and that school districts are not "persons" having rights protected by the Fourteenth Amendment.[28] But such an argument ignores the critical fact that it is school children, not school dis-

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validated by the Supreme Court in Gray v. Sanders, 372 U.S. 368 * * *" (R. 430; 201), and he found "a gross disparity, amounting to invidious discrimination, between the representation afforded the Grand Rapids School District * * * and the representation of other constituent school districts on the Board" (R. 430; 204). Finding that the Michigan legislature had in fact conferred a right to vote for a representative county school board, despite the two-step election system, he concluded that the arrangement was constitutionally defective. In our view, *Gray* is of considerable relevance, but does not completely carry the day here. There the county-unit system was simply a device for assigning different weight to the votes cast in various counties, and did not involve the election of "units" which would then select among various candidates. However, *Gray* undoubtedly would have been decided the same way had the votes been cast for "electors" who would then select among candidates according to the expressed wishes of a majority of those voting for them. Here the "electors" themselves serve a function other than simply making selections according to the expressed wishes of those voting for them, since each school district's representative in electing the county board members is himself elected initially as a member of that school district board, and not just to elect county board members, as the hypothetical "elector" in the *Gray* situation would have done. In short, *Gray*, in our view, is analogous but not necessarily controlling.

[28] See, *e.g.*, *Williams* v. *Mayor and City Council of Baltimore*, 289 U.S. 36.

tricts, who read library books and require special educational programs. It is taxpayers, not boards of education, who supply the revenue for the Board."[99] They *are* "persons" protected against unconstitutional State action by the Fourteenth Amendment.

It is not contended that the residents of Kent County have an "absolute" or constitutional right to elect the County School Board. Nor is it suggested there can never be a two-step election scheme, wherein the voters elect an assembly which in turn selects the members of the governing body, to which the equal-population principle is inapplicable. But once it is determined that the body is to be a representative one, and that its membership is to be determined, directly or indirectly, through an election system, the system devised must be one which treats each member of the electorate equally.[100] No person's vote may be

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[99] In the *Strickland* case the plaintiffs consisted of parents of children attending or having a right to attend public schools operated by the county school board (see 256 F. Supp. at 828). While perhaps a wise cautionary measure to avert an attack on standing, it would seem that all residents and taxpayers entitled to vote for members of an allegedly malapportioned school board would have sufficient standing to maintain such an action.

[100] As stated by the Court in *Gray* v. *Sanders*, 372 U.S. 368, 379: "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, and wherever their home may be in that geographical unit." Here the geographical unit which County School Board members represent is the entire county, yet those residing in the Grand Rapids School District, for instance, have only 1/39 of the voting influence in selecting such members, although comprising over 55 percent of the county's total population. *Fortson* v. *Morris*, 385 U.S. 231,

undervalued, even though it passes through an intermediary. To decide otherwise would be to allow the intricacies of a sophisticated system to work an infringement not allowed under simple and straightforward schemes.[101] But the "Constitution forbids 'sophisticated as well as simple-minded modes of discrimination'" (*Reynolds*, 377 U.S. at 563, quoting from *Lane* v. *Wilson*, 307 U.S. 268, 275).[102]

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the Georgia gubernatorial election case, does not require a different result than that which we suggest here. The factual situation there was unique, and in *Fortson* the Court clearly intimated that, had the Georgia legislature been grossly malapportioned, as the electing assembly in the instant case is, it would have reached a contrary conclusion (see 385 U.S. at 235).

[101] Dissenting Judge Fox's concern that allowing the election system to stand would in effect permit the legislature "to completely nullify the result of Reynolds * * *" is not unwarranted (R. 430; 211). Indeed, if such a scheme meets constitutional muster, "a limitless circumvention" of *Reynolds* not only at the local level, through delegating functions to local bodies selected by similar means, but also at the State level might be possible. If, in the wake of and to avoid the effect of *Reynolds*, a State determined that its legislators would be selected through a two-step process, whereby the voters in each county, for example, would elect an "elector" who would then, along with the other "electors" so determined, choose the members of the legislature, it seems plain that such an attempted circumvention would not be permissible, under *Gray* and *Reynolds*. If such a scheme would not be allowed at the State level, no convincing reason exists for sanctioning it at the local level.

[102] In this regard, see also *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633, 653, a companion to *Reynolds*, where the Court stated: "However complicated or sophisticated an apportionment scheme might be, it cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside."

Here the court below denied relief in part because this Court had not yet applied the equal-population principle to local government bodies (see note 54, *supra*).[103] The time is now ripe for that application. Despite the difficulties incident to the two-step election process, no distinction should be drawn, we submit, between Michigan county school boards and other school boards—or between school boards and local bodies generally. Thus, in our view, the judgment below was erroneous and should be reversed.[104]

We stress that, should the Court entertain doubts as to the proper disposition of this case because of the peculiar characteristics of the two-step election system, such doubts would have no relevance to the basic

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[103] In our view, dissenting Judge Fox, and impliedly the judges in the majority, properly rejected an argument grounded on the availability of a political remedy to achieve popular election of school board members. The existence of such a remedy is, under this Court's decision in *Lucas*, of very limited constitutional significance (377 U.S. at 736–737) (see the discussion *supra*, pp. 74–76). And such a remedy was not in any event practically available under the instant circumstances, since, as pointed out by Judge Fox (R. 430; 215): "The procedure outlined in M.S.A. 15.3394 (2) and (3) is constitutionally unacceptable, requiring as it does that a majority of constituent school districts, representing more than 50% of the children on the last school census in the county district, must adopt resolutions in favor of such a procedure. The problem with this plan is that the Grand Rapids School District, with 48.04% of the school-age children in the * * * [county], and 55.6% of the total population, would need the votes of nineteen other school districts (there being a total of 39 in Kent County) to bring about a popular election. Thus again, patently, a small minority has effective power to frustrate the will of the great majority."

[104] No possible jurisdictional problem appears to exist in this case. See the discussion *infra*, p. 126.

question of whether *Reynolds* is generally to be applied to the election of school boards, most of which, across the country, are elected directly by the people. That question is a pressing and important one, and we urge that that much at least be laid to rest.

C. GOVERNING BOARDS OF SPECIAL DISTRICTS WHICH ARE ELECTED FROM DISTRICTS SHOULD ALSO BE COVERED BY THE EQUAL-POPULATION PRINCIPLE.

While the issue of malapportioned special districts[165] is not raised in any of these cases, a brief discussion of this matter might be helpful in considering the general problem of fair districting and proper apportionment at the local government level. The question is relevant if one wishes to explore the ultimate scope and logical consequences of a holding that the equal-population principle of *Reynolds* applies at the local level.

Special districts are the fastest growing category of local government today, having increased by 27 percent between 1957 and 1962.[166] This growth is the result of many factors and the reasons for the creation of any particular district may be difficult to determine.[167] Often, the primary reason is that the ordinary units of local government lack the authority to undertake a particular function or are unable to finance a certain activity because of limitations on tax

[165] By "special districts" we mean all those special-function units of local government other than school boards, as discussed *supra*, pp. 20-21.

[166] From 14,424 to 18,323. See 1962 Census of Governments, 1.

[167] See U.S. Advisory Commission on Intergovernmental Relations, The Problem of Special Districts in American Government, ch. VII.

rates, indebtedness, or the ability to issue bonds. However, some special districts are formed because of citizen dissatisfaction with the performance of established governmental units or as a result of an unwillingness of such governments to undertake or expand a particular function. Perhaps the somewhat indiscriminate growth of special districts will be curbed by revitalized, properly apportioned, general-function units and by appropriate action by reapportioned State legislatures. In any event, special districts are a common feature of our governmental system, and some, though not many, of the governing boards of the bodies are elected from districts (see *supra*, p. 21).

The arguments made earlier in support of applying the equal-population principle of *Reynolds* to "little legislatures" and school boards logically pertain to special districts as well. Recognizing that special districts exercise delegated authority, are often created at the initiative of the voters, lack general "legislative" duties, and share overlapping jurisdiction with other units, none of these considerations, we submit, justifies malapportionment with respect to the election of their governing bodies. A substantial number of special districts have authority to levy property taxes and issue bonds, and there appears to be a close correlation between taxing power and an elected governing board (see note 30, *supra*). Some special districts perform important and substantial governmental functions having a direct effect on the everyday lives of the residents of the community involved; others plainly do not. Some deal with matters of

general interest to most or all citizens, while others handle matters of particular interest to certain segments of the population which are of little concern to the people generally. Such variations apart, however, it would seem, at least *prima facie*, that where State or local law directs a system of election from districts for choosing the members of the governing board of a special district, the equal-population principle requires that the districts be substantially equal in population. To hold otherwise would depart from the basic teaching of *Reynolds*—that voters cannot be treated differently simply on the basis of where they happen to reside within the geographical unit to be represented.

A few writers have suggested that at least some special districts need not be covered,[108] and it is not in-

[108] See Weinstein, *Effects of Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 Colum. L.Rev. 21 (1965); Note, 44 Neb. L.Rev. 850 (1966). Weinstein's suggested distinction between general-function and special-function units, insofar as the applicability of *Reynolds* is concerned, while having some practical appeal (and apparently appealing to some of the lower courts, which have suggested that only bodies exercising "legislative" powers are within the constitutional ambit), does not, in our view, withstand close analysis. Where the right to elect members of bodies from districts is conferred, it is not entirely reasonable to require voters to be treated equally in some situations, but not in others, depending on the nature, powers and functions of the particular body. A blanket rule that no special-function units are constitutionally required to be apportioned on a population basis would be little more than an open invitation for States to circumvent the requirement as to general-function units by conferring more powers on the former bodies and by creating new special-function units rather than delegating additional powers to general-function units. In addition, the

conceivable that a doctrine could be worked out which would stop short of an all-encompassing rule. For example, only those districts exercising "substantial" powers or "significantly" affecting the residents might be required to apportion on a population basis; in other words, some sort of *de minimis* approach might be adopted. However, the task of selecting and consistently applying criteria of that order would undoubtedly present grave difficulties. A clear and sharp line between applicability and inapplicability would be far more easily administered.

Another approach might be to look at the number of different activities engaged in, or functions performed by, the particular special district. But this would not seem to be a viable criterion either, since a single-function district may have a greater impact on individuals than a district with several fields of interest. Nor would it seem profitable to select certain, more critical fields of interest and require only those districts involved in such activities to be fairly apportioned. Every function is potentially critical and a potential source of controversy.[100] Moreover, situations may exist in which a multiple-function dis-

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suggested dichotomy would exclude school boards from the equal-population requirement. School boards are a substantially different sort of body from the many variegated kinds of other special-function units. For the reasons discussed *supra*, pp. 92–94, it would be most undesirable, in our view, for school boards not to be within the equal-population principle.

[100] See *Evans* v. *Newton*, 382 U.S. 296 (involving a public park), and *Brown* v. *Louisiana*, 383 U.S. 131 (relating to a public library).

trict will combine one or more critical functions, in greater or lesser proportion, with several non-critical functions. Again, it does not solve the problem to engage in the labelling of bodies as "legislative" or "administrative" (see note 79, *supra*). Finally, if some, or all, special districts were not required to be apportioned on a population basis, there would be problems in distinguishing between "special districts" with many functions and powers and "general governments" with only a few. And should a general government which must be properly apportioned begin to spin off or delegate functions to special districts, which are not required to be apportioned on a population basis, determining at what point that government is no longer required, or the special districts begin to be required, to be apportioned on a population basis would be a virtual impossibility.

These are but a few of the complexities which might be encountered. Actually, such line-drawing questions are more appropriate for a legislative rather than a judicial body. Under a rule that all governmental bodies whose members are elected from districts are covered by the equal-population requirement of *Reynolds*, a State can still draw such lines among various local governmental bodies simply by determining which are to be elected from districts and which elected at large or not elected at all. The argument for a consistent and thoroughgoing application of the constitutional principle at stake is not an unrealistic one, and the practicalities support that

approach rather than one characterized by tenuous and artificial distinctions.[110]

[110] Passing mention should be made of several related problems which are not before the Court presently but which involve the applicability of the equal-population principle to various kinds of governmental bodies apart from those here discussed. One such problem relates to elected judges. In *Stokes* v. *Fortson*, 234 F. Supp. 575 (N.D. Ga), the court held that a system under which superior court judges were nominated from various judicial circuits but elected on a statewide basis did not violate the Equal Protection Clause. First the court stated that it could discern no "discrimination among voters or unequal weighting of votes of the sort condemned by the one man-one vote principle" (234 F. Supp. at 577), noting that no contention was made that the judges must be nominated "from circuits apportioned equally according to population" (*ibid.*, n. 1). The court concluded that "the fact that the statewide electorate may override the choice of the circuit in no way offends the principles of Baker v. Carr and its progeny" (*ibid.*). Continuing, the court stated (*ibid.*): "[E]ven assuming some disparity in voting power, the one-man-one-vote doctrine, applicable as it is now to selection of legislative and executive officials, does not extend to the judiciary. Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency. Moreover there is no way to harmonize selection of these officials on a pure population standard with the diversity in type and number of cases which will arise in various localities, or with the varying abilities of judges and prosecutors to dispatch the business of the courts. An effort to apply a population standard to the judiciary would, in the end, fall of its own weight." See also *Romiti* v. *Kerner*, 256 F. Supp. 35 (N.D. Ill.), which involved a challenge to the apportionment of Illinois Supreme Court judicial districts. Without passing on the applicability of *Reynolds* to the election of judges, the court upheld a constitutional amendment designed to correct the admitted malapportionment of judicial districts but which deferred implementation to allow the present judges to complete their terms and succeed themselves. In the course of its opinion, the court stated (256 F. Supp. at 46): "We have little doubt that, in a proper case, there is a valid distinction between ap-

IV. APPLICATION OF THE EQUAL-POPULATION PRINCIPLE TO LOCAL GOVERNMENTAL BODIES IS JUDICIALLY MANAGEABLE

We do not blink the fact that a holding in the instant cases that *Reynolds* applies generally at the local

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plying the 'one man, one vote' rule in a legislative reapportionment case [and] to the election of a state supreme court judiciary * * *. Under the facts of this case, as they now exist, we do not reach or decide that interesting question." Compare *Davis* v. *Curry*, 21 C.D. L.A. 39 (W.D. Mo.). Application of the equal-population principle to judges elected from districts within the area of their court's jurisdiction presents a question different from that involved in the instant cases. Judges are not generally regarded as serving in a representative capacity, and valid considerations apart from population may underlie apportionment of judicial officers. At all events, there is no need to resolve this question at this time.

Several other cases have related to the applicability of this Court's apportionment decisions to the election of persons to political party offices. In *Lynch* v. *Torquato*, 343 F. 2d 370, the Third Circuit upheld the dismissal by the lower court (228 F. Supp. 262 (W.D. Pa.)) of a suit challenging the election of a Democratic Party county chairman by precinct committeemen and seeking to require the election of the chairman by popular vote of all registered Democratic voters, on the ground that several precincts contained widely disparate numbers of registered Democrats. Holding that *Reynolds* and *Gray* were inapplicable to "the internal management of a political party" (343 F. 2d at 372), the Third Circuit affirmed. *Lynch* involves a somewhat unique and potentially difficult problem, but on its facts appears, in our view, to have been correctly decided. Later decisions relating to local governmental bodies have consistently and properly distinguished *Lynch*. Applicability of the equal-population principle to political party elections may well depend on the function performed by the body being elected, as noted by the Third Circuit (*id.* at 372–373); there all candidates for public office were nominated in primaries and not at party conventions. In this regard, see also *Davis* v. *Sullivan County Democratic Committee*, 21 C.D.L.A. 55 (N.Y. Sup. Ct., Sullivan Co.), relying on *Lynch* and reaching a similar conclusion. No such issue is of course raised in the instant cases.

level of government will potentially affect thousands of local governmental bodies. This has led some to argue (as was also argued in *Baker* v. *Carr* and *Reynolds* v. *Sims*) that the problem is beyond the bounds of judicial manageability, and that only chaos and confusion in government will result from judicial intervention.[11] The problems are formidable to be sure—in large part because of past failures to confront them—but we believe that the apprehensions are overstated.

Viewed from hindsight, most of the anxieties and forebodings prompted by this Court's decisions in *Baker* and *Reynolds* have not in fact materialized. Predictions that federal courts would be continuously harassed by apportionment litigation, repeatedly faced with making difficult political determinations and persistently engaged in the tedious task of redesigning districts, have not been borne out by subsequent developments. Progress toward population-based representation has been made in virtually every State, without disrupting the functioning of State government and often with minimal involvement by the federal

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[11] Such an argument necessarily assumes that considerations relating to manageability, such as an increased judicial workload, the inconvenience accompanying adjustment of apportionment arrangements, etc., are relevant factors even though the rights asserted are constitutionally based and individual in nature. Certainly federally protected rights cannot be adjudicated—either upheld or rationalized away—on the basis of how much judicial burden and adjustment and inconvenience a particular decision is likely to have. In deciding *Brown* v. *Board of Education*, 347 U.S. 483, the Court was well aware that its holding would require change in a large number of then-segregated school systems in various States (see *id.* at 495), but did not rule differently on that account.

judiciary.[112] In the almost three years since *Reynolds* was decided, this Court has had before it for decision after plenary consideration only four State legislative apportionment cases.[113] While the number of local bodies is far greater, that experience nevertheless augurs well for the successful application, in a workable and satisfactory way, of the equal-population principle at the local governmental as well as the State legislative level. A full accommodation will take somewhat longer, but much of the groundwork has already been prepared.

That there are as many as 90,000 local governmental bodies[114] in this country emphasizes the significant impact which these units have on the daily lives of all citizens. The size of the figure also points up the potential scope of the malapportionment problem and demonstrates the need for a clear statement by this

[112] See 55 National Civic Rev. 394–400 (July 1966), for a State-by-State summary. There is good reason to believe that the responsive chord struck by *Baker* and *Reynolds* will be found to exist in regard to local government apportionment as well. Indeed, the degree of acceptance at the local level is indicated by the small number of such cases in which review in this Court has been sought, despite the volume of litigation in the State and lower federal courts.

[113] *Fortson* v. *Dorsey*, 379 U.S. 433; *Fortson* v. *Toombs*, 379 U.S. 621; *Burns* v. *Richardson*, 384 U.S. 73; *Swann* v. *Adams*, No. 136, 1966 Term, decided January 9, 1967.

[114] This represents a substantial decrease in local units over the last ten years. See 1962 Census of Governments, 1:

Type of unit	1962	1957	1952
Counties	3,043	3,050	3,052
Municipalities	17,997	17,215	16,807
Townships	17,144	17,198	17,202
School districts	34,678	50,454	67,355
Special districts	18,323	14,424	12,340
Totals	91,185	102,341	116,756

Court as the applicability of *Reynolds*. But it by no means implies that local malapportionment is judicially unmanageable. Since the equal-population principle comes into play, in our view, only where there is an election scheme involving the use of districts, the number of local governmental bodies possibly affected is immediately reduced substantially. Thus, while 2,516 of the 3,049 county governing boards (about 82.5 percent) are elected pursuant to schemes involving at least some use of districts, the estimated percentages for other types of governing bodies are much lower. Extrapolation from available figures (using 1962 data) and sample surveys indica. that about 40 percent of the 17,997 municipalities, less than 20 percent of the 34,678 school districts, less than 20 percent of the 18,323 special districts, and a comparably small percentage of the 17,144 townships have governing boards which are elected, in whole or in part, by districts (see note 25, *supra*). These calculations indicate that, as a composite figure, roughly 25 percent of all governing boards of local governmental units are potentially subject to a requirement of population-based apportionment and districting. And at least some of the bodies potentially affected are presently apportioned on a population basis, as to them, no litigation to compel adjustment would be necessary.

Unlike most of the litigation involving apportionment at the State level, much of the litigation involving apportionment of local bodies would undoubtedly be brought in State rather than in federal courts. That has been the experience to date. The development seems a desirable one, not only because it eases the burden upon the federal judiciary, but because the greater familiarity of State courts with local

governmental systems will in general facilitate application of the equal-population principle to the various kinds of local bodies found in the several States. State courts have traditionally dealt with local government apportionment matters,[115] and can be expected to have little hesitancy on this score, once the constitutional principle has been clearly articulated by this Court. On several occasions this Court has specifically encouraged State courts to involve themselves in the adjustment of legislative representation.[116] This has borne fruit in the local government field (see the discussion *supra*, pp. 41–49); no less than seven State courts of last resort have already held the equal-population principle of *Reynolds* applicable at the local level.

[115] See, *e.g.*, *State ex rel. South St. Paul* v. *Hetherington*, 61 N.W. 2d 737, 741 (Minn. Sup. Ct.); *State ex rel. Scott* v. *Masterson*, 183 N.E. 2d 376 (Ohio Sup. Ct.); *Griffin* v. *Board of Supervisors*, 384 P. 2d 421, (Calif. Sup. Ct.), involving local government apportionment controversies decided before *Reynolds* and under State, rather than federal constitutional, law. Compare *Opinion of the Justices*, 209 A. 2d 471 (N.H. Sup. Ct.).

[116] In *Maryland Committee for Fair Representation* v. *Tawes*, 377 U.S. 656, a companion of *Reynolds*, the Court stated (377 U.S. at 674): "We applaud the willingness of state courts to assume jurisdiction and render decision in cases involving challenges to state legislative apportionment schemes." And in both *Scranton* v. *Drew*, 379 U.S. 40, and *Forty-Fourth General Assembly of Colorado* v. *Lucas*, 379 U.S. 698, the Court vacated the judgments of the lower federal courts and remanded the cases for further consideration in light of supervening State Supreme Court decisions relating to legislative apportionment. Finally, in *Scott* v. *Germano*, 381 U.S. 407, in a *per curiam* opinion, the Court stated (381 U.S. at 409): "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged."

Reapportionment at the local level is well under way or already accomplished, as to many local bodies, in a significant number of States. In States where the local governmental body in question is apportioned pursuant to a general State statute, one decision holding that statute unconstitutional will often be sufficient to stimulate a general and statewide adjustment, without the need for a specific challenge to the composition of each and every local body of that kind.[117] And, even where such a situation does not exist, several decisions establishing the basic guidelines for local reapportionment would probably induce compliance on the part of units not expressly bound by the judgments rendered. In addition, once the applicability of the equal-population principle is definitely established by this Court, it seems reasonable to assume that appropriate action by the State legislatures might be expected in many States to insure effective compliance on a statewide basis.[118] In short, there is no reason to assume that litigation attacking the existing apportionment and districting arrangements for countless governmental bodies will prove necessary in order to implement a decision holding *Reynolds* applicable at the local level.

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[117] See, *e.g.*, *State ex rel. Sonneborn* v. *Sylvester*, 132 N.W. 2d 249, where the Wisconsin Supreme Court's decision held invalid a single State statute prescribing the formula for county governing board apportionment in all but two of Wisconsin's counties; *Hanlon* v. *Towey*, 142 N.W. 2d 741, where the Minnesota Supeme Court struck down a single State statute relating to districting for county governing boards in all but several Minnesota counties. See also *Mauk* v. *Hoffman* 209 A. 2d 150 (N.J. Super. Ct., Ch. Div.).

[118] See note 73, *supra*, in regard to State legislative activity in this direction; see generally, however, the discussion *supra*, pp. 74–76.

Nor can it reasonably be concluded that the requirement to reapportion or redistrict will bring local governments to a standstill or render them ineffective. Judicial relief will not, in all likelihood, be required as to the large bulk of presently malapportioned arrangements. And, as shown in the State legislative apportionment litigation, the judiciary can generally provide for relatively smooth transition with no significant impairment of the normal operations of government, by recognizing the *de facto* legality of acts performed by a malapportioned body and by staying injunctive relief and avoiding direct involvement in the redrawing of district lines while the parties and the officials concerned pursue a political remedy. In many instances, the necessary reapportionment or redistricting can be accomplished by the local body itself; in others, it will require only *pro forma* approval by the State legislature. In those States where local apportionment is accomplished by the State legislature, the use of committees or commissions or study groups to draft and propose comprehensive remedial legislation would minimize the burden on the legislature and the disruption of governmental operations. Since apportionment at the local level is very rarely dealt with in State constitutions, in contrast to legislative apportionment, there would be no need to engage in the time-consuming and sometimes cumbersome processes of constitutional amendment.

Nor will the federal judiciary be overly taxed. In the first place, State courts can be expected to handle a lion's share of whatever litigation may eventuate. State courts which were reluctant to exercise jurisdiction in legislative apportionment controversies, or denied their authority to do so, will be far less re-

luctant to deal with local apportionment questions. To be sure, some suits will continue to be brought in the federal courts. But in many of these cases the convening of a three-judge district court will not be necessary—in contrast to the situation in cases challenging State legislative apportionment schemes. As we shall have occasion to elaborate (*infra*, pp. 118–125), 28 U.S.C. 2281, the basic provision relating to three-judge courts, has been consistently construed as requiring a three-judge court only when a suit to enjoin the enforcement of a State statute of general and statewide application is brought. Such a situation of course invariably existed in the State legislative apportionment cases, but not so here. Typically, suits relating to apportionment at the local level involve a challenge only to a local charter or ordinance or to a State statute limited in its application to a particular political subdivision. Indeed, a number of district courts have refused to convene a three-judge court in cases involving local apportionment during the past several years on this very ground.[119]

Assuming, therefore, that three federal judges will not ordinarily be required to sit as a district court to hear and decide, as an initial matter, local government apportionment cases, the burden on the federal judiciary will be considerably less than might first be imagined. By the same token, since no direct ap-

[119] See, *e.g.*, *Ellis* v. *Mayor and City Council of Baltimore*, 234 F. Supp. 945, 946 (D. Md.), affirmed, 352 F. 2d 123, 124 n. 1 (C.A. 4); *Delozier* v. *Tyrone Area School Board*, 247 F. Supp. 30, 31 (W.D. Pa.); *Strickland* v. *Burns*, 256 F. Supp. 824, 825 n. 1 (M.D. Tenn.); *Johnson* v. *Genesee County*, 232 F. Supp. 563, 564–566 (E.D. Mich.); *McMillan* v. *Wagner*, 239 F. Supp. 32, 33–34 (S.D. N.Y.). See also Circuit Judge Bryan's opinion in support of the dissolution of the three-judge

peal will lie from a single judge's decision, no undue burden should be placed on this Court. Rather, appeal will appropriately be taken to a court of appeals, and such intermediate appellate review will probably reduce considerably the number of appeals to this Court.[120]

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court initially convened in No. 724, one of the instant cases (R. 724; 74–78). Compare, however, *Simon* v. *Lafayette Parish Police Jury*, 226 F. Supp. 301 (W.D. La.), reversed and remanded for convening of a three-judge court *sub. nom. Simon* v. *Landry*, 359 F. 2d 67 (C.A. 5), certiorari denied, 385 U.S. 838. Once the pertinent principles are established, many such cases could probably be decided on the basis of stipulated facts without need for a hearing. And where three judges are required, the decision by that court would presumably have effect statewide, thus reducing the overall amount of litigation.

[120] See, *e.g.*, *Ellis* v. *Mayor and City Council of Baltimore*, 352 F. 2d 123 (C.A. 4); *Lynch* v. *Torquato*, 343 F. 2d 370 (C.A. 3), in neither of which cases further review was sought in this Court. In one of the instant cases, No. 724, the appeal is taken from a decision of the Fourth Circuit reversing the judgment of the single-judge district court.

In several situations where it has been deemed inappropriate to convene a three-judge court, a non-statutory district court of three judges has sat or two additional judges have participated at the trial in an advisory capacity. *Ellis* v. *Mayor and City Council of Baltimore*, 234 F. Supp. 945, 946 (D. Md.); *Strickland* v. *Burns*, 256 F. Supp. 824, 825 n. 1 (M.D. Tenn.). In both cases the two additional judges were invited by the single judge to sit with him because of the importance of and great local interest in the particular cases. Such a flexible procedure appears to provide a single district judge with a sensible and practicable way to obtain the assistance and advice of other judges in cases involving novel, difficult and substantial questions which are nevertheless inappropriate for a three-judge statutory court under this Court's consistently narrow reading of Section 2281. Appeal from a decision of such a non-statutory court would lie to the court of appeals, of course, and not to this Court, since 28 U.S.C. 1253 confers jurisdiction on this Court only in cases "required" to be heard by three judges.

What is more, once the controlling constitutional principles are definitively established, a three-judge court may be unnecessary even in those situations where, considering only the nature of the statute challenged, a statutory court might otherwise be thought to be required. Under the rule established in *Bailey* v. *Patterson*, 369 U.S. 31, Section 2281 becomes inapplicable once the constitutional question is "settled beyond question" and "is foreclosed as a litigable issue" (369 U.S. at 33).[121]

Finally, we stress that this Court need not here concern itself in any detail with the question of remedial techniques appropriate for use in local government apportionment cases. The same considerations of flexibility and equitable discretion, sanctioned by *Reynolds* and applied in subsequent cases dealing with State legislative apportionment, pertain with equal force in these cases.[122] Indeed, remedial prob-

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[121] See, *e.g.*, *Lodico* v. *Board of Supervisors*, 256 F. Supp. 440, 441 (S.D. N.Y.), where the court determined, in reliance on *Bailey*, that "as a matter of practical judicial administration" a three-judge court was not required. See also *Glisson* v. *Mayor and Councilmen of Town of Savannah Beach*, 346 F. 2d 135, 136 (C.A. 5). We do not mean to intimate that, once the question of the applicability of the equal-population principle to local governmental bodies is definitely settled by this Court, in no such cases would the convening of a three-judge court be proper. Individual cases may occasionally still require the resolution of substantial and unsettled issues, and thus not fall within the ambit of the *Bailey* rule. Nor do we mean to suggest that the jurisdiction of a three-judge court, if properly invoked as an initial matter, can be somehow lost through an intervening clarification or resolution of constitutional issues. But where the unconstitutionality of a challenged apportionment is clear, under *Bailey* three judges would be unnecessary, although a general State statute is involved.

[122] As with State legislative cases, proper remedial techniques in local government controversies "will probably often

lems at the local level present fewer difficulties. Not only is there a body of law already developed in the lower courts; some of the remedial techniques which have been utilized in certain cases as interim measures, such as at-large elections, seem better suited at the local than at the State level.[123]

In both situations, of course, the fashioning of permanent apportionment arrangements should be left, wherever possible, to the State and local legislative bodies and to the people. To the extent necessary, however, judicially cognizable standards are plainly available in the approaches and concepts which have been evolved, and are still evolving, in the State legislative cases, and are readily transferable to local government litigation. Similarly, as to substantive standards, the courts may readily adapt and apply precepts relating to the proper measure of population,[124] the maximum permissible variations from perfect equality among districts and considerations jus-

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differ with the circumstances of the challenged apportionment and a variety of local conditions" (377 U.S. at 585).

[123] A similar remedial device—weighted voting—was used by the lower court as a temporary measure in one of the instant cases, No. 491 (see the discussion *supra*, pp. 79–80). For the reasons there stated, we do not regard the validity of weighted voting as a permanent arrangement as properly before the Court, although the voters subsequently adopted a similar plan (combining an increase in seats with weighted voting), which, however, is not yet in effect. We note, however, that Nassau County, New York, a neighbor of Suffolk County, has had a weighted voting plan in effect for a number of years.

[124] See generally *Burns* v. *Richardson*, 384 U.S. 73, 90–97. Since the Bureau of Census no longer breaks down population figures to the extent of stating the populations of subdivisions (such as wards) or of local political units separately, it may sometimes be necessary to utilize registered voter rather than total population figures in effecting local government reap-

tifying miminal departures from population-based representation,[127] and the frequency with which reapportionment and redistricting is required.[128]

V. JURISDICTIONAL DEFECTS MAY EXIST IN TWO OF THE FOUR INSTANT CASES

All four of the instant cases come here from lower federal courts. Each of the three cases (Nos. 430, 491, and 624) in which probable jurisdiction was

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portionment and redistricting. *Burns* indicates that the use of registered voter figures is permissible so long as no discriminatory purpose or effect is shown (see 384 U.S. at 95–97). Compare the view of the Fourth Circuit in the *Ellis* case, 352 F. 2d 123, 126–130. See generally Weinstein, *supra* note 108, at 24; Note, 34 U. Cinc. L. Rev. 397 (1965).

[127] However, the fact that local governmental bodies are almost always unicameral suggests that perhaps smaller minimal variations should be allowed, since the underrepresentation of one area in one house cannot be offset by overrepresentation in the other, as with State legislatures (see *Reynolds*, 377 U.S. at 577).

[128] Under *Reynolds*, the frequency of State legislative apportionment was purposely geared to the decennial census taken by the federal government, since it generally provided the only reliable statewide figures (see 377 U.S. at 583–584). As a general matter, such an approach seems sufficient and expedient at the local level as well. Since local governmental bodies often have significantly smaller constituencies than State legislatures, periodic shifts and significant growth in population may have a far more dramatic effect, and result in a serious imbalance in representation, at the local level. If reliable figures are available for a particular local governmental unit, between censuses, it would not seem wholly out of the question to require the correction of gross disparities more often than once every ten years (see *Burns*, 384 U.S. at 96). On the other hand, considerations of stability and continuity in governmental organization (see *Reynolds*, 377 U.S. at 583) weigh heavily in favor of requiring adjustment no more frequently than every ten years, except perhaps upon a clear showing in an extreme case.

noted by this Court on December 5, 1966, is here on direct appeal from the decision of a three-judge district court convened pursuant to 28 U.S.C. 2281. In the fourth case (No. 724) a single judge rendered judgment and appeal was initially taken to the Fourth Circuit, which reversed, and the appeal to this Court was from that decision. An order of January 9, 1967, set No. 724 for argument along with the other three cases, postponing a determination as to jurisdiction to the hearing on the merits and directing the parties to that case to brief and argue the question of whether a three-judge court should have been convened. In light of this order, we address ourselves to the propriety of convening a three-judge court in all the cases, viewing the Court's earlier action in noting probable jurisdiction in Nos. 430, 491 and 624 as not foreclosing consideration of the jurisdictional question in those cases. As indicated in our memorandum filed in *Avery* v. *Midland County*, pending on petition for certiorari, No. 958, this Term, we have doubts as to whether a three-judge court was properly convened in two of the cases here on direct appeal (Nos. 491 and 624).

We have already stated our view that a large majority of suits brought in the federal courts challenging malapportionment of local governmental bodies can and should be tried before a single-judge, rather than a three-judge, district court, with appellate review initially lying in the courts of appeals (*supra*, pp. 113–115). Such an approach would have the salutary effect of lightening the burden of judicial administration placed on the federal courts in connection with this sort of litigation. Nor is it a mere

rule of convenience. Our view is wholly consistent with and follows from the long-standing interpretation of 28 U.S.C. 2281, which is read as not requiring the convening of a three-judge court to try an action seeking to enjoin a State statute of limited, as distinguished from general, application.

The objective of Section 2281, as recently expressed in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154, is "to prevent a single federal judge from being able to paralyze *totally* the operation of an *entire* regulatory scheme * * * by issuance of a *broad* injunctive order" (emphasis added). "The crux of the business," the Court had said earlier, in *Phillips* v. *United States*, 312 U.S. 246, 251, "is procedural protection against an improvident *state-wide doom* by a federal court of a state's legislative policy" (emphasis added).[127] Accordingly, it has been held unnecessary to convene a court of three judges to entertain suits to enjoin the enforcement of an Arizona statute authorizing municipalities, by further legislative action, to assess costs of street improvements against abutting property, *Ex parte Collins*, 277 U.S. 565; a New York statute imposing taxes assessed by and for the sole use of New York City, *Ex parte Public National Bank*, 278 U.S. 101; and a Florida statute applying only to the Everglades Drainage District, *Rorick* v. *Board of Commissioners*, 307 U.S. 208.[128] In the latter case,

[127] See, also, *Bailey* v. *Patterson*, 369 U.S. 31, 33, stating that "[t]he three-judge requirement is a technical one to be narrowly construed * * *."

[128] In *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 228, the Court held that a three-judge court was not required to enjoin various officials of Prince

this Court observed (307 U.S. at 212): " 'Despite the generality of the language' of that Section, it is now settled doctrine that only a suit involving 'a statute of general application' and not one affecting a 'particular municipality or district' can invoke [the predecessor of Section 2281]."

It follows, *a fortiori*, that the requirement for a three-judge court is inapplicable to suits challenging the constitutionality of municipal charters and ordinances and orders of local governing boards.[12] Moreover, Section 2281 does not come into operation merely because State officials are sought to be restrained, if "the sphere of their functions" is a matter only of local concern (*Rorick* v. *Board of Commissioners*, 307 U.S. at 212). By the same token, the premise for a three-judge court is not satisfied "by joining, as nominal parties defendant, state officers whose action is not the effective means of the enforcement or execution of the challenged statute." *Wilentz* v. *Sovereign Camp*, 306 U.S. 573, 579. In similar circumstances, a number of lower federal courts have

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Edward County from closing its public schools, paying county tuition grants and processing applications for State tuition grants. The Court reasoned that the plaintiffs were not attacking an action which the State commanded of the county, but something the county did "with state acquiescence and cooperation," although noting that the single judge's decision "may have repercussions over the State," and stated: "Even though actions of the State are involved, the case, as it comes to us, concerns not a state-wide system but rather a situation unique to Prince Edward County." See generally Currie, *The Three-Judge Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1 (1964).

[12] See *Uihlein* v. *City of St. Paul*, 32 F. 2d 748 (C.A. 8), certiorari denied, 281 U.S. 726; *Davis* v. *City of Little Rock*, 136 F. Supp. 725 (E.D. Ark); *Teeval Co.* v. *City of New York*, 88 F. Supp. 652 (S.D.N.Y.)

concluded, in cases challenging malapportionment at the local level, that three-judge courts should not be convened. See, *e.g.*, *Ellis* v. *Mayor and City Council of Baltimore*, 234 F. Supp. 945, 946 (D. Md.), affirmed, 352 F. 2d 123, 124 n. 1 (C.A. 4); *Delozier* v. *Tyrone Area School Board*, 247 F. Supp. 30, 31 (W.D. Pa.); *Strickland* v. *Burns*, 256 F. Supp. 824, 825 n. 1 (M.D. Tenn.); *Johnson* v. *Genesee County*, 232 F. Supp. 563, 564–566 (E.D. Mich.); *McMillan* v. *Wagner*, 239 F. Supp. 32, 33–34 (S.D.N.Y.).

In light of the narrow construction given the language of Section 2281 in these and like cases, it is clear that few apportionment cases involving local governmental bodies require the convening of three-judge courts. Most county governing boards for example, are self-apportioned. Often the State statutes merely determine the number of members of the county board and the manner of election, leaving the task of drawing districts, and apportioning the members among the districts, to the local body itself.[120] In this situation, the claim that the apportionment violates the Equal Protection Clause would not draw into question the constitutionality of the statute, but only the constitutionality of the local body's actions pursuant to the statute.[121] In other instances, when the

[120] See *Borges* v. *Loftis*, 87 F. 2d 734, 735 (C.A. 9), where the court stated: "The fact that the county ordinance was adopted in conformity with a state plan applicable to a large number of counties in the state does not convert the ordinance passed by the county board of supervisors into a statute of the state."

[121] According to this analysis, a three-judge court probably was improperly convened in *Martinolich* v. *Dean*, 256 F. Supp. 612 (S.D., Miss.), and improperly ordered convened in *Simon*

county government operates under a charter granted by the State or adopted by the county electorate, State statutes will have merely authorized the county to draw the charter and, usually, incorporated the charter into the State laws after it has been adopted. The apportionment of members among districts will be accomplished by the charter itself or by the governing board acting pursuant to the charter. In either case, the claim would not be that the statutes are unconstitutional, but that the charter, or the board's actions pursuant to the charter, are unconstitutional. That the charter is incorporated into the State's statutes does not lead to a contrary conclusion, for the "statute" is still one of limited application, and concerns only the county involved.

In some States apportionment and districting for county board seats is determined by the State legislature by a special statute applying only to the particular county. While the powers and duties of the board may be set out in a general statute applicable to all counties, and incorporated into the statute organizing the specific county board, no challenge would be directed at the constitutionality of these statutory provisions. Rather, the attack would properly be made only on those provisions dealing with apportionment and districting. Since such statutes would clearly be of limited application to a single county, a three-judge court would not be required.

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v. *Landry*, 359 F. 2d 67 (C.A. 5), certiorari denied, 385 U.S. 838. No significance in this regard should, in our view, be attached to this Court's denial of certiorari, earlier this Term, in *Simon*.

City council seats are normally apportioned by, or pursuant to, a charter adopted by the people or granted by the State. Here again, the constitutional attack is on the charter or council action, not the legislation granting or authorizing the adoption of the charter.[133] In the unusual instance in which a city charter is incorporated into the State statutes, such a statute is nevertheless clearly one of limited application and no three-judge court would be necessary.[133]

Occasionally, a situation exists in which the apportionment of a local governmental body is determined by a State statute applying to all or a substantial number of units of a particular class of government throughout the State.[134] Here, even though local officials are sought to be restrained and even though it is only one particular unit whose reappor-

[133] See *Ellis* v. *Mayor and City Council of Baltimore*, 234 F. Supp. 945, 946 (D. Md.), and *McMillan* v. *Wagner*, 239 F. Supp. 32, 33 (S.D. N.Y.), where the convening of a three-judge court was, in our view, properly refused.

[133] And, in each of the situations discussed above, the same result would follow whether or not the complaint joined as defendants the Governor, the Secretary of State, the Attorney General, the State Board of Election Commissioners, or any other State official, under *Wilentz* v. *Sovereign Camp*, 306 U.S. 573 (see *supra*, p. 121).

[134] In some instances, categories of local governments may be classified by population, or on some other basis, so that a statute may not apply to every county or city or school district. Nevertheless, if the statute challenged applies to all local governments within such a class, it should be considered to be one of general application, and, in our view, a three-judge court would be properly convened.

tionment is sought,[18] the constitutional attack is aimed at a statute which applies generally throughout the State and to all such units in the State. Thus, in such a situation, the convening of a three-judge court would be proper.

It remains only to determine how these general jurisdictional concepts apply to the particular situations here involved. Such a determination is necessary, of course, because this Court has jurisdiction on direct appeal from a judgment of a three-judge court, under 28 U.S.C. 1253, only where the action was one "required * * * to be heard and determined by a district court of three judges." Thus, if the statutory courts were improperly convened in Nos. 430, 491, and 624, appeals to the respective courts of appeals, and not this Court, should have been taken. And, in No. 724, if a three-judge court should have been convened, the single judge who decided the case lacked jurisdiction and appeal to this Court from the Fourth Circuit's decision reviewing the merits is jurisdictionally defective.

In No. 724, a single district judge properly heard and decided the case, in our view, since the challenge was directed at a city charter provision prescribing the so-called 7–4 plan. Although the city charter was enacted into State law, it is clear that that statute was one of limited application, relating only to one

[18] See *Rorick* v. *Board of Commissioners*, 307 U.S. 208, 212, where the Court stated: "An official though localized by his geographic activities and the mode of his selection may, when he enforces a statute which embodies a policy of statewide concern, be performing a state function" within the meaning of Section 2281.

Virginia municipality. As Circuit Judge Bryan observed in dissolving the three-judge court initially convened: "[T]he controversy is of a local nature, without statewide significance, and so not within the intendment of 28 U.S.C. 2281" (R. 724; 75). Thus, we submit, this Court's question as to whether a three-judge court should have been convened in No. 724 should be answered in the negative. A single district judge properly heard and decided the case, appeal to the Fourth Circuit from that decision was proper, and this Court's jurisdiction to review the judgment of the court of appeals is properly invoked under Section 1254(2).

Nor do we perceive any jurisdictional difficulties in No. 430. There a three-judge court was convened, and the case is before this Court on direct appeal. But there the statute challenged was one relating generally to all Michigan county school boards of a certain type. It was thus a State statute of general and statewide application and a three-judge court was properly convened under Section 2281.

Conversely, the propriety of convening three-judge courts in Nos. 491 and 624 is, in our view, questionable. In No. 491 the constitutional attack was directed toward Sections 201 and 203 of the Suffolk County Charter, which in substance provide that the county governing board shall be composed of the supervisors of the several towns of the county and that each supervisor shall have one vote. While the county charter was enacted into State law, that enactment could hardly be regarded as constituting a State statute of general application, since the charter

provisions plainly relate, and could relate, only to one New York county. That the three-judge court which sat in No. 491 was aware of the jurisdictional considerations under Section 2281 is obvious from a reading of that court's basic opinion (R. 491; 124, 128, 130-131, 133-134). Somewhat inexplicably, however, no resolution of the jurisdictional question was ever articulated by the court, which simply continued to sit as a statutory court. None of the court's orders enjoined the operation of a State statute, and the basic order simply adjudged "[t]hat Section 203 of the Suffolk County Charter is invalid as applied * * *" (R. 491; 199).[136] It would appear, therefore, that a three-judge court was improperly convened and

[136] An argument to the contrary—that the enjoining of a State statute of general application was sought so that the three-judge court was properly convened—can be made in No. 491. Here the complaint attacked not only the pertinent provisions of the Suffolk County Charter but also several general provisions of the New York County Law, Sections 150 and 153, which were, however, specifically inapplicable to counties like Suffolk which had chosen an alternative form of county government. Presumably the argument would be that, if the court held the charter provisions relating to the composition of the Board of Supervisors invalid, a "gap" in the pertinent law would be created and these general statutory provisions would then become effective, as to Suffolk County, if not also struck down by the court. Perhaps this is theoretically sound, but the court did not find it necessary even to discuss these statutory provisions and plainly did not hold them invalid or order their enforcement enjoined. Rather, the court specifically noted that the charter could be amended by local action (R. 491, 133), and supplanted the existing apportionment plan, as prescribed by the charter, with a weighted voting plan which it ordered into effect temporarily, while directing the board to prepare charter amendments which would provide for permanent apportionment on a proper basis.

that this Court lacks jurisdiction under 28 U.S.C. 1253 to reach and decide the case on the merits.

Similarly, in No. 624 the challenge was directed against a State statute prescribing the apportionment and districting scheme for electing members of the county governing board, and State officials were among the defendants named. Nevertheless, the statute at issue related only to Houston County, Alabama, and could not therefore be properly viewed as a statute having general and statewide application.[137] Unlike the situation in No. 491, the three-judge court convened in this case made no mention whatever of the jurisdictional question relating to Section 2281 and the matter was not briefed or discussed by the parties. As in No. 491, it would appear that a three-judge court was improperly convened and that the case is not properly before this Court on direct appeal.

Should the Court conclude that three-judge courts were improperly convened in Nos. 491 and 624, and that appeals accordingly do not lie here, it may never-

[137] An argument could conceivably be made that, even though the statute involved was itself literally limited in application to one county, the convening of a three-judge court was still proper, since the statute challenged was very similar in form to other statutes relating to the composition of county governing boards in other Alabama counties. Thus, the argument would go, a matter of statewide interest was actually involved, because the court's decision would have at least some precedential effect as to the apportionment of a number of other Alabama county boards. We have found no case upholding such a basis for three-judge court jurisdiction under Section 2281; indeed, *Borges* v. *Loftis*, 87 F. 2d 734 (C.A. 9), points to a contrary result. See note 130, *supra*.

theless enter appropriate corrective orders.[138] Appeal from a judgment of an improperly convened three-judge court lies to the appropriate court of appeals,[139] but where an appeal is taken only to this Court the time within which to appeal to an intermediate appellate court will invariably have expired. Thus, the practice developed by this Court in such situations, in order to preserve the rights of the appellants, has been to vacate the judgment below and remand the case to the district court whose jurisdiction was initially invoked for the entry of a new order. Assuming that the Court reaches and decides the question of the applicability of the equal-population principle to local governmental bodies in the other pending cases and holds in favor of applicability, such a remand need not be a time-consuming or wasteful step. No new hearings or briefs would be required. In No. 491, the single judge might well determine to adopt the opinions and orders of the three-judge court, which he joined, as his own. In No. [illegible], Judge Johnson, who dissented from the judgment of the three-judge court, would be free, upon remand, to enter his dissent as the opinion and judgment of the district court.

Consideration of the thorny and difficult jurisdictional problems should not, in our view, be permitted to obscure or color the broad and important constitutional question raised in these four cases. That question is simply whether the equal-population principle

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[138] See *e.g.*, *Bailey* v. *Patterson*, 369 U.S. 31, 34, and the cases there cited.

[139] See *Phillips* v. *United States*, 312 U.S. 246, 254.

of *Reynolds* applies to bodies of local government whose members are elected from districts. For the reasons developed at length in our brief, that question, we submit, should be answered affirmatively.

CONCLUSION

For the reasons stated, the judgment of the court below in No. 430 should be reversed, and the judgment of the court below in No. 724 should be affirmed. Assuming that three-judge courts were properly convened in Nos. 491 and 624, the judgment in No. 491 should be affirmed and the judgment in No. 624 should be reversed. Should the Court conclude, however, that it lacks jurisdiction on direct appeal in either Nos. 491 or 624, then the judgment should be vacated and the case remanded to the district court.

Respectfully submitted.

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APPENDIX A–I

Section 294a of the Michigan School Code (Mich. Stat. Ann. § 15.3294(1)) provides as follows:

> The members of the board shall be elected biennially on the first Monday in June by a body composed of 1 member of the board of education of each constituent school district, who shall be designated by the board of education of the constituent school district of which he is a member. The secretary shall send a notice by certified mail of the hour and place of meeting to the secretary of the board of education of each constituent school district at least 10 days prior to the meeting. The president and secretary of the board shall act as chairman and secretary, respectively, of the meeting. The term of office of each member elected to the board shall be for 6 years and shall begin on July 1 following his election, except as hereinafter provided. Not more than 2 members of the board shall be from the same school district unless there are fewer districts than there are positions to be filled. Any vacancy shall be filled by the remaining members of the board until the next biennial election. Notice of the vacancy shall be filed with the state board of education within 5 days after its occurrence. If the vacancy is not filled within 30 days after it has occurred, it shall be filled by the state board of education. Candidates for election to the board shall be nominated by petitions which shall be signed by not less than 50 school electors of the district who are registered to vote in the city or township where they reside. Any qualified elector

shall be eligible to sign as many petitions as there are vacancies to be filled. Nominating petitions shall be filed with the secretary of the board not later than 30 days prior to the date of the biennial election. The secretary shall determine the sufficiency of said petitions, and the eligibility of the candidates therein nominated. The secretary shall cause to be prepared, printed or duplicated ballots for the biennial election, listing on said ballots the names of all candidates properly nominated. If no nominating petitions have been filed for a candidate to fill a vacancy then, in this event and only in this event, the chairman of the biennial election may accept nominations for that vacancy from the floor. * * *

Appendix A–II

Sections 201 and 203 of the Suffolk County Charter (Ch. 278, Laws of New York, 1958) provide as follows:

§ 201. The board of supervisors; general powers. The supervisors of the several towns of the county, when lawfully convened, shall constitute the board of supervisors of the county. It shall be the legislative and policy determining body of the county and shall, except as otherwise expressly provided in this charter, have and exercise all the powers and duties of the county together with all the powers and duties which now are, or may hereafter be, conferred or imposed on boards of supervisors by all laws applicable to the county not inconsistent with this charter. The board of supervisors shall also have such other powers and duties as are provided by this charter.

§ 203. Voting; quorum. Each supervisor shall have one vote. A majority of the whole number of the members of the board shall constitute a quorum. Except as otherwise provided by law, local laws and resolutions shall be adopted by a vote of not less than a majority of the total membership of the board. In case of a tie vote on any matter at any meeting of the board of supervisors the county executive shall have a casting vote, provided, however, that he shall not have a vote as to any local law or resolution which provides a new form of government for the county or changes the voting strength of the supervisors, or which changes the location of the county seat.

Appendix A--III

Section 2 of Act No. 9, Acts of Alabama, Regular Session, 1957, provides as follows:

Section 2. That Houston County, Alabama, is hereby divided into five (5) Board of Revenue and Control Districts, as follows: District Number 1 shall embrace and be composed of Beats Number 1, 2, and 4 and shall be represented by the incumbent Commissioner, H. A. Hollis; District Number 2 shall embrace and be composed of Beats Number 5, 6, 7, and 11 and shall be represented by the incumbent Commissioner, F. C. Jackson; District Number 3 shall embrace and be composed of Beats Number 10, 12, and 14 and shall be represented by the incumbent Commissioner, W. Harvey Hicks; District Number 4 shall embrace and be composed of Beats Number 8, 9, and 13 and shall be represented by the incumbent Commissioner, G. D. Raley; and District Number 5 shall embrace and be composed of Beat Number 3. The Governor is authorized and empowered to appoint a member of the Board of Revenue and Control, as hereby created, effective upon the bill or act becoming a law, to serve as District Commissioner of District Number 5, and who shall serve until his successor is elected at the General Election to be held on the first Tuesday after the first Monday in November, 1958, and becomes qualified, and who shall receive as compensation the sum of $1,200.00 per annum payable in the same manner and from the same funds of the County with which the other Commissioners are paid. One member of said Board of Revenue and Control hereby

created shall hereafter be nominated and elected by the voters of each of the above-numbered districts, and he shall have been a resident of and a qualified elector in the District for a period of two years time immediately preceding the General Election to be held on the first Tuesday after the first Monday in November, 1958, and shall continue to reside therein during his continuance in office; and the members elected shall assume the duties of their office on the first Monday after the second Tuesday in January, 1959, following their election, and shall hold office for a period of four (4) years and until their successors are elected and qualified. Candidates for membership on the Board of Revenue and Control for Houston County, Alabama, shall be nominated by the voters of his respective district in the Primary next preceding the General Election at which time they shall be elected by the voters of his respective district.

APPENDIX A–IV

Sections 3.01 and 3.02 of the Charter of the City of Virginia Beach (Ch. 147, Acts of Assembly, 1962, as amended by ch. 39, Acts of Assembly of Virginia, 1966) provide as follows:

§ 3.01 COMPOSITION. The City shall be divided into seven boroughs. One of such boroughs shall comprise the City of Virginia Beach as existing preceding the effective date of this charter and shall be known as the borough of Virginia Beach, and the remaining six boroughs shall comprise the six magisterial districts of Princess Anne County as existing immediately preceding the effective date of this charter and shall be known as the boroughs of Bayside, Blackwater, Kempsville, Lynnhaven, Princess Anne (formerly known as Seaboard) and Pungo. The council shall consist of eleven members, one to be elected by the city at large from among the residents of each of the seven boroughs and four to be elected by and from the city at large.

§ 3.02 ELECTION OF COUNCILMEN. On the second Tuesday in June in 1966, and on the second Tuesday in June of every fourth year thereafter, there shall be a general election at which the qualified voters of the city shall elect eleven councilmen for terms of four years beginning the first day of September next following the date of their election and until their successors are duly elected and qualified. Each candidate shall state whether he is running at large or from the borough of his residence, but otherwise, candidates shall be nominated under general law. Election and qualification of councilmen in nineteen hundred sixty-six shall terminate the terms of all incumbent councilmen even though they may have been elected for longer terms.

APPENDIX B–I

	All units	Counties	Municipalities	Townships	School districts			Special districts		
					Total	Taxing power	Elected	Total	Taxing power	Elected
Ala.	782	67	349	-------	114	114	67	202	-------	-------
Alaska	86	-------	40	-------	10	10	10	6	6	-------
Ariz.	378	14	61	-------	251	251	251	52	52	52
Ark.	1,308	75	417	-------	417	417	417	200	-------	119
Calif.	4,022	57	372	-------	1,630	1,630	1,608	1,082	1,755	Most
Colo.	1,198	62	253	-------	312	312	312	566	419	Some
Conn.	308	-------	34	182	8	8	8	204	166	*M.T.
Del.	207	3	51	-------	90	-------	Few	63	-------	-------
Fla.	764	67	366	-------	67	67	67	264	96	*M.T.
Ga.	1,218	159	531	-------	197	197	Mixed	301	-------	-------
Hawaii	20	3	1	-------	-------	-------	-------	16	-------	16
Idaho	834	44	200	0	121	121	121	450	374	*M.T.
Ill.	6,452	102	1,251	1,433	1,540	1,540	1,539	2,126	1,092	Some
Ind.	3,091	92	546	1,000	894	894	Most	560	220	-------
Iowa	2,642	99	944	-------	1,336	1,336	1,336	283	72	Some
Kan.	5,410	105	618	1,546	2,261	2,261	2,261	880	764	Most
Ky.	872	120	365	-------	208	208	208	179	26	Some
La.	628	62	208	-------	67	67	67	241	203	-------
Maine	668	16	21	470	26	26	Most	135	18	Some
Md.	351	23	182	-------	-------	-------	-------	176	16	-------
Mass.	886	12	39	312	29	29	Some	194	87	*M.T.
Mich.	3,816	83	509	1,250	1,866	1,866	1,866	99	7	Few
Minn.	5,212	87	845	1,822	2,343	2,343	2,343	115	24	Most
Miss.	772	82	266	-------	155	155	Some	268	1	Few
Mo.	3,726	114	992	329	1,640	1,640	1,640	742	83	Some
Mont.	1,387	56	124	-------	1,015	1,015	1,015	192	108	Most
Neb.	5,124	93	537	478	3,264	3,264	3,264	752	551	Most
Nev.	136	17	17	-------	17	17	17	85	30	Most
N.H.	580	10	13	221	221	221	221	85	70	70
N.J.	1,895	21	334	233	512	512	512	295	147	147
N. Mex.	306	32	80	-------	91	91	Most	102	24	102
N.Y.	3,502	57	612	932	1,231	1,231	1,234	970	968	-------
N.C.	675	100	449	-------	-------	-------	-------	126	27	Most
N. Dak.	3,028	53	356	1,387	986	986	986	246	153	Most
Ohio	3,358	88	932	1,328	833	833	833	172	57	Some
Okla.	1,959	77	533	-------	1,225	1,225	1,225	124	10	Most
Ore.	1,469	36	222	-------	484	484	484	727	484	Most
Pa.	6,201	66	1,003	1,555	2,179	2,179	2,177	1,308	-------	-------
R.I.	97	-------	8	31	2	2	-------	56	48	48
S.C.	552	46	235	-------	109	Some	-------	142	73	Some
S. Dak.	4,463	64	307	1,072	2,940	2,940	2,940	80	10	80
Tenn.	687	95	280	-------	14	Some	Some	298	-------	Some
Tex.	3,327	254	866	-------	1,474	1,474	1,474	733	366	Many
Utah	428	29	212	-------	40	40	40	142	80	Many
Vt.	424	14	66	238	32	-------	32	72	59	72
Va.	390	96	236	-------	-------	-------	-------	48	-------	Some
Wash.	1,646	39	263	96	411	411	411	887	699	Most
W. Va.	389	55	224	-------	55	55	55	55	3	Some
Wis.	3,726	72	593	1,271	1,782	1,782	1,782	68	4	Some
Wyo.	464	23	90	-------	207	207	207	144	43	Most
D.C.	2	-------	1	-------	-------	-------	-------	1	-------	-------
Totals	91,185	3,042	17,997	17,144	34,678	(**)	(**)	16,323	9,457	(**)

*"M.T." means most of those with taxing power.
**No accurate figures available.

Source: Bureau of the Census, 1962 Census of Governments, Tables 12 and 13; "Individual State Descriptions," *id.* at 343 *et seq.*

Appendix B–II

A. States in which members of county governing board are elected at large without restrictions:

Maine	Utah
Ohio	Vermont
Oregon	Wyoming
Pennsylvania	

B. States in which members of county governing board are, or can be, elected by districts with districting under local control:

Arizona*	Missouri*
California*	Nebraska*
Florida*	New York
Idaho*	North Dakota*
Iowa*	Oklahoma*
Kansas*	South Dakota*
Kentucky*	Texas*
Louisiana	Virginia
Minnesota	Washington**
Mississippi*	Wisconsin*

C. States in which members of county governing boards are elected at large with district residence requirements, with districting under local control:

Colorado*	New Mexico*
Indiana	West Virginia*
Montana*	

*State law directs local unit to district on basis of population, or on basis of population plus other factors, such as area, convenience, or compactness.

**Members are nominated by districts, elected at large.

D. States in which members of county governing board are usually elected by districts, with districting done by State legislature:

Alabama	Michigan
Arkansas	Nevada
Delaware	New Hampshire
Georgia	New Jersey
Hawaii	North Carolina ***
Illinois	South Carolina
Maryland	Tennessee
Massachusetts	

*** Members are elected at large with district residence requirements fixed by State legislature.

Source: Bureau of the Census, Governing Boards of County Governments: 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1967